135-432

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~286~~. 106

THE NEW YORK ELEVATED RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 1, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 380.

THE NEW YORK ELEVATED RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 U. S. Circuit Court for the Southern District of New York.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
against
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Affidavit of Service.

CITY AND COUNTY OF NEW YORK, *ss:*

Emile Cohen, being duly sworn, says: I am of the age of nineteen years and upwards. On the fourth day of September, 1886, at corner 23rd street and 3rd avenue, in the city of New York, I served the annexed writ of error on the defendant in error by delivering a copy thereof to the cashier of said def't in error, personally, and leaving the same with him, at the same time showing him the annexed writ of error and the signature of the Hon. Wm. J. Wallace, thereto subscribed. I know the person served as aforesaid to be the cashier of the bank mentioned and described in said writ of error as the defendant in error herein.

EMILE COHEN.

Sworn to before me this fourth day of September, 1886.
WM. H. WOODHULL, No. 133,
Notary Public, N. Y. City.

2 U. S. Circuit Court for the Southern District of New York.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
against
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Affidavit of Service.

CITY AND COUNTY OF NEW YORK, *ss:*

Albert J. A. Friedmann, of the city of New York, being duly sworn, says: I am of the age of sixteen years and upwards. On the fourt- day of September, 1886, at No. 237 Broadway, in the city of of New York, I served the annexed writ of error on Mr. Kelly, one of the attorneys for the def't in error herein, by delivering a copy thereof to said attorney, personally, and leaving the same with him, at the same time showing him the annexed writ of error and the signature of the Hon. Wm. J. Wallace, thereto subscribed. I know the person served as aforesaid to be the attorney for the bank mentioned and described in said writ of error as the defendant in error herein.

ALBERT J. A. FRIEDMANN.

Seal Andrew A. Henderson, Notary Public, New York Co.

Sworn to before me this fourth day of September, 1886.
ANDREW A. HENDERSON,
Notary Public, N. Y. Co.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The New York Elevated Railroad Company, plaintiff in error, and The Fifth National Bank of the City of New York, defendant in error, a manifest error hath happened, to the great damage of the said The New York Elevated Railroad Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of U. S. Circuit Court, South. Dist. New York.

TIMOTHY GRIFFITH,

Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
N. Y., Sept. 3, 1886.

WM. J. WALLACE, *Judge.*

4 [Endorsed:] E. S. R. U. S. circuit court, southern district of New York. The New York Elevated Railroad Company, plaintiff in error, against The Fifth National Bank of the City of New York, defendant in error. Writ of error. Davis & Rapallo, attorneys for plaintiff in error, 32 Nassau St., N. Y. city. 1.45 p'd 1/. Due service of a copy of the within writ of error is hereby admitted. Dated September 4th, 1886. —— ——, att'ys for def't in error. U. S. circuit court. Filed Sep. 4, 1886. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second

circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from five to one hundred and twenty-four, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The New York Elevated Railroad Company, plaintiff in error, against The Fifth National Bank of the City of New York, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

TIMOTHY GRIFFITH, *Clerk.*

5 United States Circuit Court for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff'- attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New [L. S.] York, this 5th day of March, in the year one thousand eight hundred and eighty.

JOHN I. DAVENPORT, *Clerk.*
KELLY & MACRAE,
Plaintiff'- Attorney-.

Office and post-office address, No. 237 Broadway, New York.

6 Circuit Court of the United States for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
vs.
THE NEW YORK ELEVATED RAILROAD COMPANY.

The Complaint of Plaintiff by Kelly and MacRae, its Attorneys.

I. That plaintiff, The Fifth National Bank of the city of New York, is a corporation duly incorporated in and by the laws of the

United States authorizing the formation of banking associations, passed June 3d, 1864, and has its banking-house and place of business in the city of New York and within the jurisdiction of said circuit.

II. That the defendant, The New York Elevated Railroad Company, is a corporation incorporated under the laws of the State of New York.

III. That plaintiff was at all times herein mentioned and now is and for many years prior thereto was the owner in fee of the buildings, lands, and premises known as No. 300 Third avenue, in the city of New York, and situated on the southwest corner of
7 Third avenue and Twenty-third —, in said city, and said building fronts immediately on said avenue about twenty-five feet.

IV. That said Twenty-third street and also said Third avenue are public streets, and that plaintiff has and is entitled to an easement and interest therein free from the obstructions and nuisances, as hereinafter stated, caused by defendants.

V. That in said building and premises plaintiff has for the last five years carried on a general banking business, and has leased and rented out to other persons the upper and other parts of said building for business and other purposes, and has thereby received large rents and compensation therefor.

VI. That by reason of the defendants having, on or about the 1st day of January, 1878, wrongfully and without plaintiff's consent, built and erected a large and permanent station or depot, with its appurtenances, across and on the street and avenue near to plaintiff's said bank and building, the use and enjoyment and value of plaintiff's said premises have ever since become greatly interfered with and lessened, in this, that said station or depot greatly interferes with and lessens the enjoyment and use of the light and air to said premises, and also that the track of defendant's railway (an elevated track), running along said Third avenue in front of plaintiff's said bank and premises and close thereto, obstructs and interferes
8 with and lessens the air and light to the same to a serious and injurious extent.

VII. And this plaintiff, further complaining, says that on or about the 1st day of August, 1878, defendants, wrongfully and without plaintiff's consent, commenced to use the track and structure of their railway along said Third avenue and immediately in front of plaintiff's said building, and to use and run engines and cars thereon almost incessantly, and in so doing to negligently blow whistles, emit steam, smoke, and noxious smells and make loud, jarring, and unpleasant motions and noises, and to a great and needless extent and without right; all of which greatly and seriously interferes with the use, comfort, and enjoyment of plaintiff's said building and premises by plaintiff, its employees, servants, and officers, and with the use and enjoyment thereof by the tenants and persons occupying the same, so that part thereof were obliged to vacate and did vacate the said premises; and, furthermore, that the rent and profits of said build-

ing and premises were and are greatly lessened and reduced by reason of the said nuisances caused, as aforesaid, by defendant.

VIII. That, furthermore, the permanent use and value of said building and premises of plaintiff have been seriously injured and impaired by reason of the jarring and concussion motions and vibrations caused to said building and by the locating of said
9 station and depot of defendant's railway at said 23d street and 3d avenue and in close proximity to plaintiff's said premises, and by the running and use of the engines and cars upon said track as aforesaid, and whereby, as aforesaid, the use and enjoyment of said premises is injuriously obstructed and interfered with and the market and rental value of the premises have been and will be in the future greatly damaged, reduced, and impaired.

IX. That no compensation has been made to plaintiff for said acts of defendant.

X. That by reason of the foregoing wrongful acts of defendant this plaintiff has suffered and sustained damages in at least the sum of twenty-five thousand dollars, which has been justly demanded of defendant, but which it wholly neglects and refuses to pay or any part thereof.

Wherefore plaintiff demands judgment of the defendant for said sum of twenty-five thousand dollars, with interest thereon, and the costs of this action.

FIFTH NATIONAL BANK OF THE
CITY OF NEW YORK,
By A. THOMPSON, *Cashier.*

KELLY & MACRAE, *Pl'ff's Att'ys.*

Office & P. O. address, 237 Broadway, New York.

10 CITY & COUNTY OF NEW YORK, *ss:*

Andrew Thompson, being duly sworn, says that he is the cashier of the Fifth National Bank of the City of New York; that he has read the foregoing complaint, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ANDREW THOMPSON.

Sworn to before me this 27th day of Febr'y, 1880.

E. STEPHENSON,
[L. S.] *Notary Public, New York County.*

11 (Endorsed:) Circuit court of the U. S., southern district of New York. The Fifth National Bank of the City of New York *vs.* The N. Y. Elevated R. R. Complaint & sum's. Kelly & Macrae, attorneys for plaintiff, No. 237 Broadway, New York. I hereby certify that on the 5th day of March, 1880, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named The New York Elevated

Railroad Company by exhibiting to James A. Cowing, treasurer of said company, the within original and at the same time leaving with him a copy of each. Dated March 22d, 1880. Louis F. Payne, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Mar. 22, 1880. John I. Davenport, clerk.

12 Circuit Court of the United States for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

The defendants answer the complaint as follows:

For a first defence.

I. They have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, third, & fifth paragraphs of the complaint.

II. They deny that the plaintiffs have an interest or easement in the Third avenue or in 23rd street, except so far as they may share the same with the public at large.

III. They deny each and every allegation contained in the sixth paragraph of the complaint, except that they admit that they have erected a station at or near the corner of Third avenue and twenty-third street.

IV. They deny the allegations contained in paragraphs seventh, eighth, ninth, and tenth of the complaint.

13 V. They allege that the railway & structures, including the structure of which the plaintiffs complain, were duly authorized by & were in conformity with the statutes of the State of New York.

VI. They allege that they were and are duly organized & are acting under an act of Legislature of the State of New York entitled "An act to authorize the formation of railroad corporations & to regulate the same," passed April 2nd, 1850, & the various acts supplementary thereto & amendatory thereof, an act entitled "An act supplementary to the act entitled An act to authorize the formation of railroad corporations," passed April 20th, 1866; an act entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester," passed April 22nd, 1867; "An act supplementary to chapter 489 of the laws of 1867, and to provide for the collection and application of revenue in the county of New York in certain cases," passed June 3rd, 1868; "An act to authorize and require the New York Elevated Railroad Company to continue & complete its railroad in the city of New York, & to regulate the construction, operation, and management thereof," passed June 12th, 1878; "An act further to provide for the construction and operation of a steam railway or railways in the counties of the State," passed June 18th, 1878.

14 VII. They allege that such proceedings were had under the divers acts aforesaid that the defendants were duly authorized to erect their railway & their station near or contiguous to the property alleged to belong to the plaintiff.

For a second defence.

They allege that the plaintiffs & the defendants are both residents of the State of New York, & that this action concerns property in the State of New York, & they claim & insist that this court has no jurisdiction over the parties to this action or over the subject-matter thereof.

FIELD, DORSHEIMER, BACON & DEYO,
Attorneys for the Defendant.

Office & post-office address, 115 Broadway, New York.

15 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

James A. Cowling, being duly sworn, says that he is the secretary & treasurer of the defendant herein; that the foregoing answer is true to his own knowledge except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. A. COWING.

Sworn, April 12th, 1880, before me—

WILLIAM MOLLOY,
[SEAL.] *Notary Public, Kings County, N. Y.*

16 (Endorsed:) Circuit court U. S. for the southern district of N. Y. The Fifth National Bank of the City of New York against The New York Elevated Railroad Company. Answer. Field, Dorsheimer, Bacon & Deyo, attorneys for defendant, 115 Broadway, N. Y. (Original.) U. S. circuit court. Filed Apr. 12, 1880. John I. Davenport, clerk.

17 Circuit Court of the United States for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK }
ag'st
THE NEW YORK ELEVATED RAILROAD COMPANY. }

GENTLEMEN: Take notice that we have this day been appointed and retained as attorneys for the defendants in the above-entitled action in the place and stead of the late firm of Field, Dorsheimer, Bacon & Deyo, dissolved on the 10th day of August, 1880, by the death of Dudley Field, and that we hereby appear for the

said defendants herein and demand that all papers in this action be served on us at our office, No. 115 Broadway, New York city.

New York, September 17th, 1880.

Yours, &c., DORSHEIMER, BACON & DEYO,
Defendant's Att'ys.

Office & post-office address, 115 Broadway, New York.

To Messrs. Kelly & MacRae, pl'ff's att'ys.

18 To clerk of the circuit court of the United States for the southern district of New York.

(Endorsed:) U. S. circuit court. The Fifth National Bank of the City of New York against The New York Elevated Railroad Company. Notice of substitution and appearance. Dorsheimer, Bacon & Deyo, def't's attorneys, 115 Broadway, N. Y. city. To the clerk of the circuit court of the United States, southern district of New York. U. S. circuit court. Filed Sep. 29, 1880. John I. Davenport, clerk.

19 U. S. Circuit Court, Southern District New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

We hereby consent that Deyo, Duer & Bauerdorf be substituted in our place and stead as attorneys for the defendant in the above-entitled action.

DORSHEIMER, BACON & DEYO,
Defendant's Attorneys.

Dated Dec. 11th, 1882.

20 (Endorsed:) U. S. circuit court, so. dist. of N. Y. The Fifth Nat'l B'k of the City of N. Y. ag'st The N. Y. El. Railroad Co. Consent for substitution. Deyo, Duer & Bauerdorf, def't's att'ys, 115 B'way, N. Y. (Original.) U. S. circuit court. Filed Dec. 28, 1882. Joseph M. Deuel, clerk.

21 United States Circuit Court for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
ag'st
THE NEW YORK ELEVATED RAILROAD COMPANY.

We hereby consent that Messrs. Davies & Rapallo be substituted in our place and stead as attorneys for the defendant in the above-entitled action.

Dated New York, December 19th, 1884.

DEYO, DUER & BAUERDORF,
Def't's Att'ys.

22 (Endorsed:) U. S. circuit court, southern dist. of N. Y. The Fifth National Bank of the City of New York against The New York Elevated Railroad Company. Consent for substitution. Davies & Rapallo, attorneys for def't, Mutual Life building, 32 Nassau street, New York city. U. S. circuit court. Filed Jan. 2, 1885. Timothy Griffith, clerk.

23 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 28th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Nathaniel Shipman, circuit judge.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

This action having come on to be tried before the Honorable Nathaniel Shipman and a jury, and a verdict having been rendered in favor of plaintiff and against the defendant for the sum of six thousand dollars, and the defendant having thereupon obtained a stay of all proceedings herein for thirty days in which to move for a new trial and prepare a bill of exceptions: Now, upon the testimony taken at the trial and upon all the papers, pleadings, and proceedings herein, and on reading and filing the consent of the attorneys for the plaintiff, hereto subjoined, on motion of
24 Messrs. Davies & Rapallo, attorneys for the defendant, it is hereby—

Ordered, That all proceedings on the part of the plaintiff herein be, and they hereby are, further stayed until the argument and decision of the motion for a new trial.

N. SHIPMAN, *Judge.*

We hereby consent to the entry of the foregoing order, provided that the motion for a new trial, &c., is brought on to be heard at the earliest day at which his hon. Judge Shipman can hear the same at New York.

KELLY & MACRAE,
Attorneys for Plaintiff.

New York, Feb. 27th, 1885.

25 (Endorsed:) United States circuit court, southern dist. of New York. The Fifth National Bank of the city of New York against The New York Elevated Railroad Company. Order staying proceedings. Davies & Rapallo, attorneys for defendant, Mutual Life building, 32 Nassau street, New York city. U. S. circuit court. Filed Mar. 6, 1885. Timothy Griffith, clerk.

26 Circuit Court of the United States for the Southern District of New York.

FIFTH NATIONAL BANK OF NEW YORK
vs.
THE NEW YORK ELEVATED RAILROAD COMPANY.

SHIPMAN, *J.*:

This is a motion by the defendant for a new trial, the jury having returned a verdict for the plaintiff for $6,000.

Before the year 1874 Third avenue and Twenty-third street, each being streets of one hundred feet in width, were legally laid out by the authorities of the city of New York over and upon lands which were acquired by condemnation for street purposes under the act of 1813, whereby said city obtained the title in fee to said streets and to the land thereunder, in trust; that the same and that each street "be appropriated and kept open for or as a part of a public street and avenue forever, in like manner as the other public streets in said city are or of right ought to be."

27 The plaintiff purchased, in the year 1874, a lot upon the southwest corner of Third avenue and Twenty-third street, which was bounded on the east by the west side of said avenue and on the north by the south side of said street, and erected thereon a building, which was completed in the spring of 1875. This building has ever since been used in the following way: The basement for stores or offices, the first floor for the plaintiff's banking-room, and the other floors for apartments.

Under the provision of the statute passed by the Legislature of the State of New York in 1875, and known as the Rapid Transit Act, which provides for the construction of elevated and underground railroads, an elevated steam railroad was built by the defendant, in the year 1879, along Third avenue.

It was held by a majority of the court of appeals of the State of New York in 1877 that under the Rapid Transit Act and the previous acts in relation to the defendant provision was "made for compensation for any property rights the abutting owners may have in the streets," the fee of which is in the city, but the question whether the contemplated structures would invade any property or rights of such owners so as to entitle them to damages it was thought did not arise. (*In re* Elevated R. R. Co., 70 N. Y., 327; *In re* Gilbert Elevated Railway Co., 70 N. Y., 361.) No compensation to the plaintiff for injury or damage was made, and there does not seem to have been any adjudication by which the plaintiff was bound on the subject.

The structure which the defendant built was a permanent one, consisting, at the corner of the street in question, of an elevated railroad track placed upon substantial pillars about fifteen feet high, and a depot over a part of Twenty-third street, which is reached by a staircase from said street, the entire structure being of the

28 strength and capacity necessary for the equipment of a rail-

road operated by steam and for the accommodation of large numbers of passengers.

This action was brought to recover damages which were alleged to have been caused to the plaintiff's property by the erection of said road and depot, and by the running of railroad trains near to the building. The principal damages was [were] alleged to consist in the obstruction of light from the building and in the injection into it of noxious odors, gas, and smoke.

The charge to the jury was to the effect that if the streets, at the point where the plaintiff's building is situate, were permanently subjected by the erections of these structures to a new use, which was subversive of and repugnant to the original use for which each street was taken—that is, for an open thoroughfare or avenue for travel—and such new and inconsistent use was a damage to the easement of the plaintiff in the street, which easement or right of property consisted only in a right to the light and air afforded by the street, and in a right of access thereto, then for the damages arising to the property from said exclusion of air, light, and access plaintiff was entitled to compensation.

The requests to charge covered five points, which were substantially as follows: 1st, that the determination whether the street should or should not be kept open as a public street rested in the discretion of the Legislature; 2d, that the evidence clearly showed that the new structures did not subject the street to a new use subversive of or inconsistent with the original use as thoroughfares; 3rd, that, in order to find there were such new and inconsistent use, the jury must find that the defendant's structures interfered with the free passage of persons, horses, or vehicles over Third avenue; 4th, that an abutting owner has no right of property in the street to be affected or damaged by such new use; 5th, that there
29 could be no recovery for so much of the damage as was caused by the operation of the railroad trains.

It is competent for the Legislature, so far as not restrained by the constitution under which it acts, to grant to a railroad company power to lay a railroad longitudinally over a highway, and where private property is taken by a use which is subversive or inconsistent with the original use, compensation must be made therefor. (Springfield *vs.* Conn. River Railroad Co., 4 Cush., 63.) When the title in fee to such street is vested in the city, in trust for the benefit of the people, no compensation is to be made to the city for the occupancy of the street by the railroad, because the Legislature conclusively determines what is for the public advantage. (People *vs.* Kerr, 27 N. Y., 188.)

In such case it is also often said that the abutting owners are not entitled to compensation because, having parted with the title to the land covered by the street, they have no remaining interest or right therein which can be taken or which can be the subject of damage. This statement of the law was true with reference to the streets which judges or commentators had in mind when the statement was made. An abutting proprietor on the street, the fee of which is in the city, has no legal interest which can be affected by

a surface horse-railroad which is placed in the street; nor, although the inconvenience and annoyance resulting from the operation of a steam surface road is much greater than that resulting from a horse-railroad, is his property ordinarily taken or appropriated in a legal sense by a steam road which is laid opposite his lot; but a state of facts has occasionally arisen within the last few years by which, although the new method of travel to which the street is subjected is for the transportation of persons or of freight, the structures which are placed upon the street for the convenience or necessities of
30 the new system are such as not only blockade and prevent the street from being an avenue for ordinary travel, but also deprive an abutting owner from access to the street or free light from it. While a Legislature may have said in general that the occupancy of the streets of a city by a steam railroad is consistent with the use for which they were established, yet it did not intend to say that all the structures which might subsequently be placed upon a particular narrow street for the purposes of such railroad did not impose a new burden upon the street. A platform may be built over a street which covers its entire width and excludes light from the roadway, and the adjacent buildings and structures may be placed opposite the lot of the abutting owner which shall prevent access to his land, and then a new condition of things is brought into existence which was not contemplated by learned judges when they said that an abutting owner has no interest in the street which can be the subject of damage.

It is this new condition which raises the question whether an abutting owner, who has no right in the soil of the street, has any especial incorporeal right therein of which he may be deprived and for the loss of which he is entitled to compensation.

The main object of a city highway is for the public travel, but that is not its only object. City streets are also incidentally to provide sites upon which dwellings and buildings for business purposes can be built. Such streets are established in order to furnish an overflowing population with places in which to live and to work. An important part of the value of a lot abutting upon a street consists in its access to the street and in the fact that one or more sides can always receive air and light, while a building away from the street may be hemmed in on all sides. This privilege or capacity which appertains to a lot abutting upon a street which has been dedicated to the public, though it has not a right in the soil
31 of the street, is real and is important, and, so far as the right of access to the street is concerned, has been distinctly recognized by courts. There may be a difficulty in defining the extent of the right, but there is a natural sense of justice which is not satisfied by the declaration that because the owner has parted with his right to the soil in front of his lot, which was taken for the purposes of a street, therefore he is remediless, although the street may be permanently so covered by new structures for the benefit of modes of travel, not used for ordinary street purposes, as to exclude him from access to it or from light from it. In the Story case this right is called an easement in the bed of the street for the purposes

of air and light and access from it. (Story *vs.* The New York Elevated R. R. Co., 90 N. Y., 122.)

But, inasmuch as the land covered by the street was taken for public uses, the abutting owner holds his easement subordinate to the rights of the public in the street, and if the new structures are not inconsistent with or destructive of the uses for which the street was originally taken he has no cause to complain. Until the streets are burdened with an occupancy which substantially injures them as thoroughfares for travel, and they are permanently subjected by the new structures to a new use, which is subversive of the original use, the abutting owner, though he may suffer inconvenience, is not legally injured, because his easement is subject to the controlling right of the public, and if the street continues to be a thoroughfare for ordinary travel, in accordance with the object for which it was originally laid out, no right of the abutting owner is trenched upon.

The question, then, which was submitted to the jury is of the first importance; it was whether, on the corner of Third avenue and Twenty-third street, either of those streets were subjected by the permanent structures there erected to a new use subversive
32 of or inconsistent with the original purpose for which the streets were taken, that of being a thoroughfare for travel, and the jury were told the main object of a street was to create and maintain an avenue for travel, and if these streets were kept open and unobstructed and were not used for purposes inconsistent with travel, the use of the street was preserved.

While the language of the charge was correct and was technically sufficient, I fear that the jury were not sufficiently clearly told by the court that in order to find that the streets were not kept open and unobstructed, the road-bed of the street not being occupied by the railroad track, it was not sufficient to show that pillars and staircases had been placed in the streets and a track had been placed upon the pillars which, to some extent, prevent the streets from being as open as they were before the road was constructed, but that they must be of opinion that substantial obstructions had been placed upon the travel upon the street, and that it was thereby rendered inconvenient to the public as a highway. I fear that the jury were unintentionally led into the opinion that because a new and permanent structure for the purposes of a steam road had been placed over a street of one hundred feet in width therefore they were permitted to find that a new and inconsistent use was imposed upon the street, although travel was practically unimpeded and light in the travelled way was not sensibly diminished and the street was not actually at that point made inconvenient for the accommodation of persons or vehicles.

As the motion for a new trial is granted for the reason which has been given, I do not consider the remaining question, which was thoroughly argued by the defendant's counsel, which was in substance that the injury caused to the plaintiff by the injection into its building of gas and smoke in consequence of the opera-
33 tion of the trains should not be considered as an element of damage. The motion for a new trial is granted.

action was brought, it is provided that the court may, and in a proper case must, permit a supplemental complaint, answer, or reply alleging material facts which have occurred after a former pleading, which, of course, would be after suit brought. In section 589 it is enacted that a variance between pleadings and proof is not material unless it has actually misled the adverse party; and by section 540, that where the variance is not material, as prescribed in section 539, the court may direct the fact to be found according to the evidence. If the continuance of the structure after the commencement of the action by the summons or after the filing of the complaint was material to a recovery for its continuance, it would seem that it
40 could have been brought in by amendment under section 544. There was no claim that the defendant was misled by this evidence. The evidence on its part, as well as that on the part of the plaintiff, covered the whole time, and there was no ground for such claim. The evidence was in the case, and as there might have been pleadings which would have made it admissible, if not admissible without more, the variance between it and the actual pleadings was immaterial within the provisions of section 540. The court was therefore permitted by that section to do what was done and what was excepted to, namely, to direct the fact to be found according to the evidence, and it would appear to be improper not to either do that or order an immediate amendment.

New York Mutual Life Insurance Co. *vs.* Armstrong, 117 U. S., 591.

And this works no wrong to the defendant if the claim for damages prior to the commencement of the action was properly tried, for there was no difference between what occurred before and what occurred after, either upon the evidence or the manner of submitting it to the jury. The recovery here will be a bar to any other action for what is embraced within this recovery.

Windmuller *vs.* Robertson, 23 Fed. Rep., 652.

Fowle *vs.* New Haven and Northampton Co., 112 Mass., 338.

41 A new trial for this would not give the defendant the benefit of any different principles as to its liability, but would merely give it another chance before a jury, which, of course, it should have if entitled to it, but otherwise not. These considerations make it unnecessary to consider whether in a case like this, where what was done was done wholly outside the plaintiff's premises and was completed before the commencement of the suit, the recovery should be to the time of trial or only to the commencement of the action. There are many cases where the question was whether the damages for the permanent injury to the property, as if the nuisance should always remain, were recoverable or not; but this precise question does not appear to have been often decided and is not free from difficulty.

Everson *vs.* Powers, 39 N. Y., 528.

Backhouse *vs.* Benoni, 9 Ho. of L. Cas., 503.

Fowle *vs.* New Haven and Northampton Co., 112 Mass., 338.

Margue on Dam., 59 to 64.
Uline *vs.* New York Central and Hudson River Railroad Co., New York court of appeals, January 19, 1886.

42 The next question is as to the right of the plaintiff to recover for the injury to that part of the building occupied by itself for banking purposes. It is argued that the inconveniences were to the persons employed and not to the plaintiff bank as such. The court, in substance, submitted it to the jury to find how much less the use of this part of the building was worth as a bank on account of this structure. This seems to be covered by Baltimore and Potomac Railroad Co. *vs.* Fifth Baptist Church, 108 U. S., 317, where it was held that a religious corporation was entitled to recover damages for interference with its comfortable enjoyment of its house of worship. It is said in argument that no damages were proved, except as to additional cost of gas, in this respect; but the situation of the plaintiff was shown and what was done by the defendant, from which it was competent for the jury to infer the damages. It is not claimed that they were led by partiality, passion, or prejudice about this.

The next question is as to the exclusion of evidence to show that if the buildings on the opposite side of Third avenue were raised as high as the law and ordinances of the city allow the defendant's structure would be in their shadow during all the time that the plaintiff's building is in its shadow, so that it would not intercept any direct rays of the sun toward that building. The admissibility of this evidence rests upon the claim that because others have
43 a right to do what would shade the plaintiff's building the defendant is not liable for shading it to the extent of that right. The defendant, however, does not have or stand at all upon the rights of these other persons. The buildings were not raised to that height, and the plaintiff would have enjoyed the light which the defendant's structure did intercept but for that structure, which the defendant as against the plaintiff had no right to erect. There is no ownership in light itself as it is diffused, and the jury has not awarded anything to the plaintiff for what belonged to any one else. This evidence would not have shown that the injury was to others and not to the plaintiff.

The next question is as to the admissibility of evidence to show that the general value of the plaintiff's building was increased by the building of the defendant's road. The injury to the permanent value of the building was not on trial. The question submitted to the jury was as to the injury to the use of the building during the time in question. No evidence offered bearing upon that question was excluded. The evidence on both sides was full as to the value of the use without the road there in comparison with that value with the road there; as to that value before the road was built and after the road was built.

44 & 45 Finally, the defendant claims that a verdict should have been directed for the defendant. The case has not been allowed to go beyond, if it has not been narrowed within, the princi-

Kelly & MacRae and Roger A. Pryor, for plaintiff.
Davies & Rapallo and Henry H. Anderson, for defendant.

Endorsed: Circuit court of the United States for the southern district of New York. Fifth Nat'l Bank of New York ag't The New York Elevated Railroad Company. Decision. Shipman, J. U. S. circuit court. Filed Jan. 17, 1885. Timothy Griffith, clerk.

34 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 24th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Nathaniel Shipman, judge.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

This action having come on to be tried before the Honorable Nathaniel Shipman and a jury, and a verdict having been rendered in favor of the plaintiff and against the defendant for the sum of six thousand dollars, and a motion having been made by the defendant at the same term upon the minutes of the trial judge to set aside the verdict and grant a new trial upon the exceptions taken, because the verdict was for excessive damages, because the verdict was contrary to evidence, and because the verdict was contrary to
35 law, and said motion having been entertained, and after hearing Henry H. Anderson in behalf of the motion and Roger A. Pryor in opposition thereto: Now, on motion of Davies & Rapallo, attorneys for defendant, it is ordered that the said motion be, and the same hereby is, granted, and the said verdict is hereby set aside and a new trial granted for the reason stated in the opinion of the court on file in the clerk's office.

N. SHIPMAN, *Judge.*

36 (Endorsed:) United States circuit court, southern dist. of New York. The Fifth National Bank of the City of New York against The New York El. Railroad Co. Order setting aside verdict and granting new trial for defendant. Davies & Rapallo, attorneys for defendant, Mutual Life building, 32 Nassau street, New York city. U. S. circuit court. Filed Sep. 25, 1885. Timothy Griffith, clerk.

37 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, circuit judge.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK
vs.
THE NEW YORK ELEVATED RAILROAD COMPANY.

Now comes the plaintiff, by Kelly & MacRae, its attorneys, and moves the trial of this cause. Likewise comes the defendant, by Davies & Rapallo, its attorneys. Thereupon a jury is empanneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and instructions of the court, on Friday, June 4th, 1886, the jury retire and on their return render a verdict whereby they find for the plaintiff in the sum of five thousand dollars, including interest, &c.

On motion of Howard Townsend, Esq., of counsel for defendant, it is ordered that the defendant have a stay of all proceedings on said verdict for twenty days within which to argue the motion for a new trial made herein.

A copy. TIMOTHY GRIFFITH, *Clerk.*

38 United States Circuit Court, Southern District of New York.

FIFTH NATIONAL BANK
vs.
NEW YORK ELEVATED RAILROAD CO. } April Term, 1886.

WHEELER, *J.:*

This is an action to recover damages for the erection of the defendant's railroad track and station-house in front of the plaintiff's banking-house, at the corner of 23rd street and Third avenue, in the city of New York. It has been once before tried with a verdict for the plaintiff, which was set aside and a new trial granted. 24 Fed. Rep., 114. It has now been heard on a motion by the defendant for a new trial for alleged errors in law occurring on the second trial.

The first ground urged for granting the motion is that it was error to admit evidence of damage to the plaintiff accruing after the commencement of the action. This evidence was admitted without objection. The defendant reserved no question about it until the evidence was all in and the charge to the jury was reached. Then the court charged the jury that if the plaintiff was entitled to recover damages for the erection of the tracks and station-

39 house in the street in front of the bank building it would be entitled to recover the amount shown by the evidence down to the time of trial. To this part of the charge the defendant excepted, and the correctness of it is a question in the case. The plaintiff's right of recovery was strictly and carefully limited to damages caused by the structure itself, as it was originally constructed, and nothing was allowed in addition for the consequences of the use of it for the running of trains or anything done from day to day. It was all directly connected with the first wrong. By section 544 of the Code of Procedure of New York, under which this

action was brought, it is provided that the court may, and in a proper case must, permit a supplemental complaint, answer, or reply alleging material facts which have occurred after a former pleading, which, of course, would be after suit brought. In section 589 it is enacted that a variance between pleadings and proof is not material unless it has actually misled the adverse party; and by section 540, that where the variance is not material, as prescribed in section 539, the court may direct the fact to be found according to the evidence. If the continuance of the structure after the commencement of the action by the summons or after the filing of the complaint was material to a recovery for its continuance, it would seem that it
40 could have been brought in by amendment under section 544. There was no claim that the defendant was misled by this evidence. The evidence on its part, as well as that on the part of the plaintiff, covered the whole time, and there was no ground for such claim. The evidence was in the case, and as there might have been pleadings which would have made it admissible, if not admissible without more, the variance between it and the actual pleadings was immaterial within the provisions of section 540. The court was therefore permitted by that section to do what was done and what was excepted to, namely, to direct the fact to be found according to the evidence, and it would appear to be improper not to either do that or order an immediate amendment.

New York Mutual Life Insurance Co. *vs.* Armstrong, 117 U. S., 591.

And this works no wrong to the defendant if the claim for damages prior to the commencement of the action was properly tried, for there was no difference between what occurred before and what occurred after, either upon the evidence or the manner of submitting it to the jury. The recovery here will be a bar to any other action for what is embraced within this recovery.

Windmuller *vs.* Robertson, 23 Fed. Rep., 652.

Fowle *vs.* New Haven and Northampton Co., 112 Mass., 338.

41 A new trial for this would not give the defendant the benefit of any different principles as to its liability, but would merely give it another chance before a jury, which, of course, it should have if entitled to it, but otherwise not. These considerations make it unnecessary to consider whether in a case like this, where what was done was done wholly outside the plaintiff's premises and was completed before the commencement of the suit, the recovery should be to the time of trial or only to the commencement of the action. There are many cases where the question was whether the damages for the permanent injury to the property, as if the nuisance should always remain, were recoverable or not; but this precise question does not appear to have been often decided and is not free from difficulty.

Everson *vs.* Powers, 39 N. Y., 528.

Backhouse *vs.* Benoni, 9 Ho. of L. Cas., 503.

Fowle *vs.* New Haven and Northampton Co., 112 Mass., 338.

Margue on Dam., 59 to 64.
Uline *vs.* New York Central and Hudson River Railroad Co., New York court of appeals, January 19, 1886.

42 The next question is as to the right of the plaintiff to recover for the injury to that part of the building occupied by itself for banking purposes. It is argued that the inconveniences were to the persons employed and not to the plaintiff bank as such. The court, in substance, submitted it to the jury to find how much less the use of this part of the building was worth as a bank on account of this structure. This seems to be covered by Baltimore and Potomac Railroad Co. *vs.* Fifth Baptist Church, 108 U. S., 317, where it was held that a religious corporation was entitled to recover damages for interference with its comfortable enjoyment of its house of worship. It is said in argument that no damages were proved, except as to additional cost of gas, in this respect; but the situation of the plaintiff was shown and what was done by the defendant, from which it was competent for the jury to infer the damages. It is not claimed that they were led by partiality, passion, or prejudice about this.

The next question is as to the exclusion of evidence to show that if the buildings on the opposite side of Third avenue were raised as high as the law and ordinances of the city allow the defendant's structure would be in their shadow during all the time that the plaintiff's building is in its shadow, so that it would not intercept any direct rays of the sun toward that building. The admissibility of this evidence rests upon the claim that because others have
43 a right to do what would shade the plaintiff's building the defendant is not liable for shading it to the extent of that right. The defendant, however, does not have or stand at all upon the rights of these other persons. The buildings were not raised to that height, and the plaintiff would have enjoyed the light which the defendant's structure did intercept but for that structure, which the defendant as against the plaintiff had no right to erect. There is no ownership in light itself as it is diffused, and the jury has not awarded anything to the plaintiff for what belonged to any one else. This evidence would not have shown that the injury was to others and not to the plaintiff.

The next question is as to the admissibility of evidence to show that the general value of the plaintiff's building was increased by the building of the defendant's road. The injury to the permanent value of the building was not on trial. The question submitted to the jury was as to the injury to the use of the building during the time in question. No evidence offered bearing upon that question was excluded. The evidence on both sides was full as to the value of the use without the road there in comparison with that value with the road there; as to that value before the road was built and after the road was built.

44 & 45 Finally, the defendant claims that a verdict should have been directed for the defendant. The case has not been allowed to go beyond, if it has not been narrowed within, the princi-

ples laid down by the majority of the court in Story *vs.* New York Elevated Railroad Co., 90 N. Y., 122.

That case has controlled this as to the extent of the plaintiff's rights and of the defendant's liabilities.

Motion for new trial overruled, stay of proceedings vacated, and judgment to be entered on the verdict.

W. F. McRee and W. H. Arnoux, for plaintiff; Henry H. Anderson, for defendant.

(Endorsed:) Circuit court of the United States for the southern district of New York. Fifth National Bank *vs.* New York Elevated Railroad Co. Decision, Aug. 10, 1886. Wheeler, J. U. S. circuit court. Filed Aug. 10, 1886. Timothy Griffith, clerk.

46 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 23rd day of August, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, judge.

THE FIFTH NATIONAL BANK OF THE CITY NEW YORK
against
THE NEW YORK ELEVATED RAILROAD COMPANY.

This action having come on to be tried before the Honorable Hoyt H. Wheeler and a jury, and a verdict having been rendered in favor of the plaintiff and against the defendant for the sum of five thousand dollars, and a motion having been made by the defendant at the same term, upon the minutes of the trial judge, to set aside the verdict and grant a new trial upon the exceptions taken, and said motion having been entertained, and after hearing Henry H. Anderson in behalf of the motion and William F. MacRae and
47 William H. Arnoux in opposition thereto:

Now, on motion of Kelly & MacRae, attorneys for plaintiff, it is ordered—

That the said motion be, and the same is hereby, denied; that the stay of proceedings heretofore granted herein be vacated, and that judgment be entered on the verdict.

HOYT H. WHEELER.

48 (Endorsed:) U. S. circuit court, southern district of N. Y. The Fifth National Bank of the City of New York ag'st The New York Elevated Railroad Company. Order denying motion for new trial, &c. Kelly & MacRae, att'ys for pl'ff, 237 B'way, N. Y. U. S. circuit court. Filed Aug. 23, 1886. Timothy Griffith, clerk.

49 United States Circuit Court, Southern District of New York.

FIFTH NATIONAL BANK OF THE CITY OF NEW YORK *against* THE NEW YORK ELEVATED RAILROAD COMPANY. } Judgment. August 26th, 1886.

The issues in this action having come on to be tried before the Honorable Hoyt H. Wheeler and a jury, at a stated term of this court held on the 2nd day of June, 1886, and the issues having been tried and a verdict for the plaintiff for five thousand dollars having been duly rendered on the 4th day of June, 1886, and the costs having been adjusted at ninety-two $\frac{74}{100}$ dollars:

Now, on motion of Messrs. Kelley and MacRae, the attorneys for said plaintiff, it is adjudged that said plaintiff, The Fifth National Bank of the City of New York, do recover of said defendant, The New York Elevated Railroad Company, five thousand dollars, together with sixty-eight and $\frac{33}{100}$ dollars, interest thereon from
50 the date of the rendition of the said verdict, and also ninety-two $\frac{74}{100}$ dollars, plaintiff's costs herein as taxed, making altogether the sum of five thousand one hundred and sixty-one $\frac{7}{100}$ dollars, and that plaintiff have execution therefor.

Judgment signed this 26th day of August, A. D. 1886.

TIMOTHY GRIFFITH, *Clerk.*

51 (Endorsed:) U. S. circuit court, southern district of N. Y. The Fifth National Bank of the City of New York against The New York Elevated Railroad Company. Judgment. Kelle and MacRae, attorneys for plaintiff, 237 B'dway, New York city. Due service of a certified copy of the within judgment & notice of entry is hereby admitted. N. Y., Aug. 26, 1886. Davies & Rapallo, defendant's att'ys. U. S. circuit court. Filed Aug. 26, 1886. Timothy Griffith, clerk.

Take notice that the within is a certified copy of the judgment in this action this day duly filed & entered in the office of the clerk of the circuit court of the United States for the southern district of New York.

New York, Aug. 26, 1886.

KELLY & MACRAE,
Att'ys for Pl'ff.

Davies & Rapallo, Esqs., att'ys for def't.

52 In the Circuit Court of the United States, in the Second Circuit, for the Southern District of New York.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK *against* THE NEW YORK ELEVATED RAILROAD COMPANY. } Bill of Exceptions.

Afterwards, to wit, on the second day of June, 1886, and at a

stated term of this court holden at the city of New York, to wit, on the fifth day of April, 1886, before the Honorable Hoyt H. Wheeler, judge, the aforesaid issues so joined as between the said parties, as by the record more fully appears, came on to be tried by a jury duly impanelled and sworn for that purpose, the said trial continuing until the fourth day of June, 1886, the said plaintiff being represented by William F. MacRae and William H. Arnoux, Esqrs., and the said defendant by Henry H. Anderson and Howard Townsend, Esqrs.; and in the course of the trial the said counsel for the defendant did take and allege sundry exceptions to the rulings,
53 both as to the admission and exclusion of testimony and to the charge of the court; which said exceptions are hereinafter specifically set forth.

On the said trial the following proceedings, among others, were had:

First exception.

The said plaintiff, having sought upon the said trial to establish its title to the premises in suit, and having offered in evidence certain deeds, attempted to trace its title to that part of Third avenue lying in front of its bank building, through two deeds, respectively, from James A. Hamilton and wife to Robert Lougue, dated December 1st, 1827, and Bertram Peter Cruger and wife to James A. Hamilton, dated March 22nd, 1827, which said deeds convey property therein described as follows: Beginning northerly at the corner of the Third avenue and Twenty-third street, thence running westerly on Twenty-third street forty-five feet and no more; thence at right angles southerly to the boundary line of the property now or late of the heirs of James Duane, deceased; thence along the said line easterly to the Third avenue; thence along the line of the Third avenue to the place of beginning, and through subsequent deeds; and the said plaintiff having sought upon the said trial to establish its title to the part
54 of Twenty-third street lying in front of its said bank building by a certain deed from George W. Pell and wife and Richard M. Pell to James D. Pell, dated December 27th, 1864, which said deed conveys property therein described as follows: Beginning on the southerly side of Twenty-third street at a point distant forty-five feet westerly from the Third avenue, and thence running westerly along Twenty-third street twenty-five feet; thence southerly, parallel with Third avenue, seventy-four feet and three-quarters of an inch; thence easterly, parallel with Twenty-third street, twenty-five feet; thence northerly seventy-four feet and three-quarters of an inch to the place of beginning; and by a deed from Richard M. Pell to the Fifth National Bank of the City of New York, dated May 11th, 1874, the grantee in said last-mentioned deed being the said plaintiff, which deed conveys property therein described as follows: Beginning at a point on the southerly side of Twenty-third street distant forty-five feet westerly from the westerly line of the Third avenue and running thence southerly, and parallel with the Third avenue,

fifty-four feet and three-quarters of an inch; thence westerly, and parallel with Twenty-third street, twenty-five feet; thence northerly, and parallel with the Third avenue, fifty-four feet and three-quarters of an inch to the southerly side of Twenty-third street, and thence easterly, along the said southerly side of Twenty-third
55 street, twenty-five feet to the point or place of beginning.

And the said plaintiff, having further attempted to trace its alleged title to the said parts of Twenty-third street and Third avenue through a deed from James Duane Pell and wife to Richard M. Pell, dated February 22nd, 1865, and subsequent deeds, which said deed conveys property therein described as follows: Beginning at the southerly side of Twenty-third street at a point distant forty-five feet westerly from the Third avenue and thence running westerly along Twenty-third street twenty-five feet; thence southerly, and parallel with the Third avenue, seventy-four feet and three-quarters of an inch; thence easterly, parallel with Twenty-third street, twenty-five feet; thence northerly seventy-four feet and three-quarters of an inch to the place of beginning; and through a deed from Isaiah Keyser and wife and others to the plaintiff, The Fifth National Bank, dated March 30th, 1874, which deed purports to convey property therein described as follows: Beginning on the southwesterly corner of Third avenue and Twenty-third street, running thence southerly along the Third avenue seventy-four feet and three-quarters of an inch, more or less, to lot No. thirty-five, on a map of land belonging to Catherine L. Duane, dated January 26th,
56 1832, made by Edwin Smith, city surveyor; thence westerly, and parallel with Twenty-third street, forty-five feet; thence northerly, and parallel with the Third avenue, seventy-four feet and three-quarters of an inch to the southerly side of Twenty-third street; thence easterly, along Twenty-third street, forty-five feet to the place of beginning.

And the said plaintiff having given evidence by a surveyor tending to show that Twenty-third street and Third avenue are each one hundred feet in width from house line to house line; that the defendant has constructed on and along Third avenue a railway track, elevated some fifteen feet above the surface of the street, supported by iron columns and supporting trains and locomotives which pass constantly before plaintiff's premises, and showing that said defendant has erected a station, with stairs thereto and therefrom, at the intersection of Twenty-third street and Third avenue; that defendant's track is fifteen feet wide; that the distance from the westerly line of Third avenue to the centre line of the westerly track of defendant's structure is thirty-eight feet six inches; and said surveyor having further testified as to the dimensions of defendant's station; and the said plaintiff having called as a witness one Andrew Thompson, cashier of the Fifth National Bank, plaintiff herein, who, having given evidence in substance as to the construction and details and the fitting up and furnishing of the building owned by the
57 plaintiff, testified further, as follows, in answer to Mr. MacRae:

Direct examination:

Q. How many stories high is plaintiff's bank building from the street?

A. Four.

Q. How is each story occupied—or was it?

A. The first floor is raised about six or eight feet from the street and is occupied by the banking-room for banking purposes. The second, third, and fourth floors are occupied by apartments—dwellings.

Q. At the time that road came there, and depot, what was the Fifth National Bank building being used for besides using it for banking purposes?

A. The basement was used as business offices.

Q. How was the first story above the bank used?

A. As dwellings—apartments.

Q. All of them?

A. All of the stories were occupied for private apartments.

Q. Did you observe the effect that the station and railroad structure immediately in front of the bank, and so far as they affect it on the side, if any, had with regard to the light in the building?

A. It lessened the light in the banking-room on the front corner, and also on the side, to the extent of two-thirds the depth of the banking-room. The light was affected some, too, on the first story above the bank, by the station.

58 Q. And has that continued up to the present time?

A. It has.

Q. How with reference to excluding the air, if you have observed?

A. It has frequently forced us, both in the banking-room and also on the first floor above the bank, to close the front windows.

Mr. ANDERSON: Is that by reason of the exclusion of the air?

Mr. MACRAE: I asked him how the air was excluded.

The WITNESS: The air is excluded, because we had to close the windows on account of cinders and smoke.

Mr. ANDERSON: One moment. I object to any question in reference to cinders and smoke.

The COURT: He does not answer the question asked him.

Q. (Repeated.) How with reference to excluding the air, if you have observed?

Mr. ANDERSON: I move to strike out the former answer of the witness on the ground that it states as to what the bank people did sometimes and not as to the effect of the structure. He said they shut the windows.

Mr. ARNOUX: We have a right to it, and whether the answer is responsive to the question or not makes no difference. If it

59 is admissible evidence, a witness can volunteer any statement, subject, of course, to a motion to strike out.

The COURT: That may be, but perhaps the better way would be to answer the question put, which I understand to refer to the structure of the building excluding the air from the bank.

Mr. ANDERSON: That is the foundation of my motion to strike out the statement of the witness.

The COURT: Just for the present we will leave that out, and the witness may answer the question.

Q. I mean with reference to the effect upon the air of the bank building, as you observed it, after the structure was put there, how the structure itself, rising up before the bank, affected the circulation of the air into the building—the building of it there, the structure itself—and also the shades over the platform running down over the bank. In addition to that, how did it affect the use of the building with reference to shutting or closing the windows?

Mr. ANDERSON: I object to that question. If counsel would come out and say what he wants to bring out, it would make it much more clear; but the structure in the street could not by any possibility affect the opening or shutting of the windows.

60 Mr. MACRAE: I have departed from that. I say in addition to that.

Mr. ANDERSON: You are coming to another part of the case, upon which we will have to have a ruling of the court.

The COURT: I understand the witness now to say that the building itself is constructed so as to obstruct the flow of the air to and fro from the building, so as to obstruct the circulation.

Mr. MACRAE: I am leaving that now and raising this other point, which I suppose the counsel will object to. I am going now to the structure itself, and to the operations of the road, and I seek to elicit from this witness whether or not it did affect the use of the building so far as shutting or closing the windows in the exclusion of air by reason of the operation of that road, not stating in what way. That is my question.

Mr. ANDERSON: We may just as well meet the issue first as last. The counsel is trying indirectly, although he seems to be afraid to put the question directly, to have the witness testify as to there being gas and smoke. Avowedly that is his purpose, and that is objectionable, and under all the cases that have been brought in this State has been excluded. I believe since the rulings have taken place at the general term in the Story case, which is one of the fundamental cases, it was expressly excluded from consideration

61 on the part of those who should have the question of damages at interest. Now, I object to the witness stating anything in answer to this question in respect to gas, or smoke, or cinders, or anything of that kind in the operation of the road.

Objection sustained.

The COURT: For the present we will proceed as I indicated. I reserve the right to change my view.

Mr. MACRAE:

Q. What effect, if any, did this elevated railway have on the rents of that building?

Mr. ANDERSON: I will ask the witness to confine his answer to the

structure itself and not the running of the trains upon it or anything connected with the running of the trains.

The COURT: He may be confined in that way. As you have asked him, he can take in the effect of the whole thing.

Mr. MACRAE: It was allowed that way before, your honor.

The COURT: You may divide the subject if you can, and if I change my view upon looking at these cases I will give you an opportunity to ask him.

Q. What effect did the structure as it existed there—the elevated railway station and the platform and the bed of the road—have upon the renting of the building?

A. It reduced the rents.

Q. How much a year?

62 Mr. ANDERSON: There is another question that I might as well raise. I ask for an election on the part of counsel for the plaintiff as to whether in this action they are claiming for loss of rents or for injury in consequence of the erection of the road.

Mr. MACRAE: Those questions were not raised on the former trial, and there is no law cited by your honor or that can be cited by the other side that makes the law of the case different now from what it was a year ago, when this case was tried before.

The COURT: I don't require you to make an election, but you must confine yourself to the legitimate proof and show that you are damaged by this structure being there (provided the jury shall find, when we get to it, that it ought not to be there)—that is, you must be confined to such damages as you can prove in any proper way on account of having this depot there and this railroad structure placed in front of the premises. Leaving out of your proof the effect of running trains, the noise, the steam, the smoke, the disagreeableness of the trains—if you leave that all out and prove in any proper way that having that structure up there as a permanent thing, supposing they had no trains at all on it, that that injured you.

The COURT: The witness must confine himself to the facts.

Q. I want you to state the facts.

63 A. There has been a loss of about $1,000 a year, since the structure has been there, in rentals.

Q. At any time after the road was built there did you lose any of the tenants?

A. Yes, sir.

Q. About what was the rental of the first story?

A. $1,100, during the years 1875, 1876, and 1877.

In answer to Mr. ANDERSON:

Cross-examination:

Q. When was your bank completed?

A. In the spring of 1875.

Q. What was the rental of the first story above the bank the first year?

A. $1,100.

Q. How many rooms does that contain?
64 A. Nine rooms.
Q. And what rental did you get for that story in 1879?
A. $900.
Q. What rental did you get in 1880?
A. $780.
Q. And what rental in 1881?
A. The same—$780.
Q. How came you to make the reduction the second year?
A. Because the family that occupied the floor complained of the nuisance, and they would not stay unless we reduced the rent?
Q. Why?
A. Because of the nuisance—the noises, steam, and smoke—and they had to shut the windows.
Q. So that the reduction the second year was in part, at least, of noise and smoke and smell. Was there a reduction made the third year?
A. No, sir.
Q. The rent continued the same?
A. The rent continued the same.
Q. With regard to the second story, who occupied the second story?
A. Mr. Held.
Q. And the rent from 1876 to 1877 was how much?
A. $1,000.
Q. And the rent from 1877 to 1878 was how much?
A. The same.
65 Q. And the rent from 1878 to 1879 was how much?
A. It was reduced to $900, I think.

In answer to Mr. MacRae:

Redirect examination:

Q. Was there anything else that you knew of that reduced the rent of the third floor, or any of the floors, than the presence of that railroad and depot?
A. There is no other earthly reason at all.
Q. Each of the tenants, then, for whom you made a reduction of rent found the running of the trains, the noise and smoke, disagreeable, in consequence of which they desired a reduction?
A. And also on account of the obscurity of the light.
Q. And also because the light was obscured?
A. And circulation of air.
Q. Now, what complaint was made on account of the obscurity of the light by reason of that road?
A. They were compelled to close their windows and pull down their shades on that account.
Q. Because the light was obscured?
A. Especially the first flat.
Q. When you speak of the nuisance you speak of the noise being

there, and the steam being there, and the smoke being there, and the passing of trains, do you not?

A. Yes, sir.

Q. Did any of them state which was the greatest nuisance?

66 A. The gas and smoke and steam entering their windows.

Q. That was considered the greatest nuisance, was it?

A. Yes, sir.

Q. What was the next nuisance?

A. On the first floor the prevention of the circulation of air in their rooms.

Q. These reductions in rent continue down to the present time, don't they?

A. Yes, sir.

In answer to Mr. ARNOUX:

Redirect examination:

Q. I want to ask you a question in regard to the light. Before the elevated road came there had you any shade in the windows on the Twenty-third-street side?

A. We did; yes, sir.

Q. Something like the shade in this court-room?

A. Exactly like these, with arches; shades in the windows and shades in the arches.

Q. In what part of the room is your desk?

A. It is about forty feet from the front, adjoining the receiving teller's desk.

Q. Before the elevated road came there did you have any artificial light at your desk?

A. No, sir.

Q. After the elevated road came and the station-house

67 was erected, as it now is, did it make any difference with your shades?

A. Yes, sir.

Q. State what.

A. We had to take the shades out of the arches of the windows.

Q. And they have been out ever since?

A. Yes, sir.

Q. And, in addition to that, did you have to put in any additional lights?

A. Yes, sir.

Q. How many?

A. Three.

Q. At which desks?

A. One at the paying teller's desk, one at the receiving teller's desk, and one at my own desk, where I never had any before.

Q. What was the reason of your putting in those additional lights?

A. Because the station on that corner obscured the light on that corner of Twenty-third street as far back as thirty or forty feet.

Q. Did the extra gas add to the gas bills considerably?

A. It did.
Q. To what extent?
A. To the extent of about sixty dollars a year or more.
Q. Has that continued from the time they were put in up to the present time?
A. Yes, sir; it has.

68 And the said plaintiff having called as a witness FREDERICK ZITTEL, real estate agent and broker, who testified in part as follows, in answer to Mr. MACRAE:

Direct examination:

Q. Have you observed and do you know of the effect of the elevated railroad upon the rentals in the vicinity of Twenty-third street and Third avenue—I mean on the avenue?
A. Yes, sir.
Q. What was the effect in 1878 and the succeeding years up to the present time—say for the two or three years after the road was built and went into operation?
A. For dwelling purposes the reduction since the elevated railroad has been there is about one-third.
Q. Now, what effect did the railroad structure, the depot and road-bed, have upon the value of the rental of premises like those?
A. You mean the apartments?
Q. Well, these apartments?
A. I should put it down about one-third less than they were before the structure.
Q. Have you noticed in that building the effect of that structure, the railroad depot and road-bed, there upon the access of light in that building?
A. I have, somewhat; yes, sir.
69 Q. What is it?
A. It throws a shadow every time a train passes. There is a shadow thrown in the bank, and cinders are thrown in, too.
Q. How about the track and station itself?
A. Well, that throws a shadow in the bank.
Q. What is the effect in the city of New York with reference to any structure like the Third avenue elevated railroad structure—I mean the depot adjacent to property—would it have an injurious or good effect upon the building?
A. It injures wherever the structures are for dwellings; for business it does not injure so much.
Q. As a real-estate broker, having the experience that you have had, Mr. Zittel, would you say that a structure like the Third avenue railway structure, close to and adjacent to even any kind of buildings for business purposes, would be of any benefit to it?
A. No, sir.
Q. Would it or would it not be injurious?
A. It would be injurious.
Q. In your experience, how valuable is the freedom of light and air to any office or building in the city of New York?

A. Well, without light and air there is no value scarcely. It is light and air that gives it the value.

Q. Any diminution of the light or air more or less depreciates the value of the property, does it not?

A. Certainly.

70 Q. Was there any reason that you know of why rents in the Fifth National Bank building should not have gone up?

A. Nothing but the elevated road.

The plaintiff offered to show by the witness the value of the building before and after the defendant's elevated railroad was built; to which the defendant objected, and the evidence was thereupon excluded.

Mr. ANDERSON: You only come down to the commencement of this action, I suppose? I will ask counsel to make a determination of what he is going for. I suppose I have a right to ask for an election at this point.

The COURT: For what length of time do you claim to recover?

Mr. MACRAE: We claim for permanent injury.

The COURT: If you are entitled to recover you claim dam-

71 ages should be assessed by the jury until now?

Mr. MACRAE: No, sir; but until as long as grass grows and water runs.

The COURT: Maybe they will take it down; if they should, then you would not want to pay back anything. But you claim the right to recover prospectively. Counsel is entitled to know what you claim. * * * I think the common law is as I stated it, that where there is a consequential injury resulting from damages that the damages may be recovered up to the time of the trial, and if they continue the right of recovery continues also. I think I will go by the common law unless I see to the contrary before the trial closes.

Mr. ANDERSON:

Q. How do you get at $1,000 a year?

A. As I stated, the first flat rented for $1,100 a year, and now $780; and the 3d flat for $600, and is now about $490; * * * there is a loss of $250 in the basement a year.

72 Q. When you speak of the injury done by these railroads to property do you refer as well to the operation as to the structure itself?

A. Certainly.

Q. That is to say, the constant running of trains and the gas and noise and smoke and so on?

A. Yes, sir.

Q. That is, in all cases?

A. In all cases.

And the said plaintiff, having called as a witness EDMOND H. MARTINE, a real estate broker, who testified in part as follows, in answer to Mr. MCRAE:

Direct examination:

Q. Are you familiar with the effect of the Third avenue elevated railroad upon the rentals along the Third avenue?

A. Yes, sir.

Q. What effect has it had upon rentals in the vicinity of Twenty-third street and Third avenue?

73 A. Well, the reduction has been from twenty-five to thirty-three and one-third per cent.

Q. Is the reduction attributable to anything else than the elevated railway that you know of?

A. Not in my judgment.

Q. About what should the rental of the first story of the Fifth National Bank be without the presence of the railroad structure there?

A. It ought to rent for about eleven hundred dollars a year.

In answer to Mr. ANDERSON:

Cross-examination:

Q. In considering the injury done to the property did you take into consideration the unsightly appearance of the structure?

A. That is one of the elements; yes, sir.

Q. And the shadows cast upon it by running trains?

A. Yes, sir.

Q. And the noise and smoke?

A. Slightly; yes, sir.

Q. And cinders or different things of that kind?

A. If you will let me state the objection, I can state it much better.

Q. Answer my question, please. Did you take those into consideration as elements?

A. Small elements; yes, sir.

74 In answer to Mr. ARNOUX:

Redirect examination:

Q. Please state to the jury what you do consider the objection.

A. In the first place, the fact of the structure being there—the depot being there; the fact that the people stand on the platform and on the trains and look into the windows. Those are the serious objections; and the light and means of accessibility to the building, and the air and the rents.

And the said plaintiff having called as a witness Mrs. MARGARET A. CROSBY, who testified in part as follows, in answer to Mr. MACRAE:

Direct examination:

Q. Were you and your husband at one time occupants of the building known as the Fifth National Bank, at the corner of Twenty-third street and Third avenue?

A. Yes, sir.
Q. What year did you go there to reside?
A. In 1876.
Q. And you left at what time?
A. 1879.
Q. Do you remember when the Third Avenue railroad was built there?
A. I do.
75 Q. And the trains began to run?
A. Yes, sir.
Q. How many composed your family at that time?
A. My husband and three children.
Q. Did you occupy the entire floor on the first story?
A. The entire floor.
Q. Did you observe any difference in the light after the road was built there?
A. I should think I did.
Q. How did it affect it?
A. It affected us in everything. In the first place, it made it very dark there after the cars stopped there, after they erected that building; all the rooms got darkened, and we had to pull down the shades. If we had the shades up the people could look in, and the dust and everything came in, so we couldn't keep the windows up. People were standing there—intoxicated people, and one thing and another—and the people staring in, and we couldn't get along at all; and then it was very disagreeable to live there after the railroad was built, on account of the smoke and cinders and everything else.
Q. Why did you leave there?
A. On account of the elevated railroad; it was a perfect nuisance.

In answer to Mr. ANDERSON:

Cross-examination:

Q. What made it dark?
76 A. In the first place, the roof, the shed of the station; and, in the second place, the smoke and steam.
Q. They made it dark?
A. Yes; in one respect they did.
Q. Do you mean to say to the jury that it was so dark as to interfere with the comfortable occupation of your apartments?
A. I do.
Q. At any part of the day?
A. All day; because there were trains running continually.
Q. Why was it necessary to put your shades down if the station darkened the front windows?
A. I didn't care about having people stand there and look into the apartments.
Q. Did you find annoyance from the smoke and cinders anywhere except in the front room?
A. In the side rooms—at the side windows—but most of it in the front rooms.

Q. Was there any except from the first side window?
A. No cinders, but the smell and smoke and gas and coal.
Q. And it was owing to this, among other things, that you went away.
A. That is the very reason.

77 And the said plaintiff having called as a witness EDMOND STEPHENSON, who testified in part as follows, in answer to Mr. MACRAE:

Direct examination:

Q. Were you at one time an employee of the Fifth National Bank, situated at the corner of Twenty-third street and Third avenue?
A. I was.
Q. In what capacity?
A. Paying teller.
Q. From what time?
A. About nineteen years; from 1864 to 1883.
Q. Where was your location inside of the bank building with reference to your business?
A. Directly in front of the entrance. My desk was next to Third avenue, directly in front of the entrance to the bank.
Q. On the right-hand side of the bank as you entered?
A. Yes, sir.
Q. What effect, if any, have you observed that the station and stairs and the permanent structure of the platform and equipments of that station itself had upon the light in the bank?
A. It had the effect to obstruct the light.
Q. To what extent?
78 A. To that extent that I was obliged to have an extra gas light put up in order to pay my checks with any safety.
Q. Do you know whether there were other gas jets put up on account of that in the bank?
A. I couldn't state positively as to that. I know in my own case that the light was the most important thing to me in paying checks and reading different handwritings. Some would be written very obscurely and others again irregularly, and so on, and I was obliged to have the best possible light in order with safety to pay the large amounts of money which I was frequently called upon to pay in cashing checks, and for that reason I found that the structure that had been erected by the elevated railroad company had so obscured the light to that extent that I asked permission to have an extra light put up directly in front of my desk, throwing the light down upon my checks, with a large green shade over it.
Q. Previously you never had?
A. Never had any before, nor had I any difficulty before.
Q. Did you observe whether or not it diminished the light, more or less, in the bank?
A. Oh, it certainly did.

79 And the said plaintiff having called as a witness SAMUEL CARDWELL, a real-estate agent, who testified in part as follows, in answer to Mr. MACRAE:

Direct examination:

Q. About what would be a fair rental for, say, the first story over the bank, in 1878, before the elevated railroad came there?

A. I think that would be let then for about $1,200.

Q. And how much for the second story?

A. Well, in mine I reduced about a hundred dollars on each story above that—say from $1,100 to $1,000.

Q. What effect, if any, would the elevated railway structure have upon the rental?

A. Upon that class of property about thirty-three per cent., I should judge.

Q. What effect has it had on property in the vicinity of Twenty-third street and Third avenue, as regards rental or value?

A. On the lower class, ordinary plain property, it is reduced about twenty-five per cent.—fully twenty-five per cent.; the better class, such as you have questioned me about, I should think, thirty-three per cent.

80 And the said plaintiff having rested, Mr. Anderson, of counsel for said defendant, moved to direct a verdict for the defendant in words as follows:

"There is no evidence in this case now, without any evidence introduced upon our side, upon which a verdict could be sustained if rendered in favor of the plaintiff for more than nominal damages. From the case is excluded now, under the rulings of the court, all questions of damage resulting from cinders or from the operation of the road, including the running of the cars, and there is no evidence before the court as to any damage sustained on the part of the plaintiff, if I correctly interpret it, into which the elements which the court will not permit to be considered do not upon the testimony enter; and, as it is for the plaintiff to establish his case by affirmative evidence, and in such a way that the jury, under the direction of the court, can draw the distinct line, I apprehend that the rule must follow that there being no separate evidence of any damage or of any loss of rentals resulting from the structure itself, standing by itself and as of itself, that there is nothing for them to consider, and that the most that could be recovered, if a recovery were had, is nominal damages.

81 The loss of rentals applies only, of course, to the two stories above the bank. As I understand, there is no evidence of loss of rentals to the basement floor, but in each of these cases and in every one of them the chief thing complained of and the chief fault in consequence of which the bank made their voluntary reduction was the smoke and cinders and the inconvenience arising from the operation of the road.

There is no evidence in the case upon which a verdict could stand, if rendered for the plaintiff, based upon an injury, a physical

injury done to this building in consequence of the structure itself, irrespective of the operation, and the nuisance, as it is described by the witness, from the operation of the road, from cinders and noise and smoke.

In every one of the cases where a reason was assigned for moving from the bank, or one upon which any reduction was made by the bank, those were the grounds assigned as prominent and paramount grounds, the interception of light being spoken of; but yet the interception of light was not the one that controlled, there being no way by which the jury can distinguish and discriminate one from the other.

This is an action to recover special damages, a special amount lost, I take it, under the circumstances—that is to say, the bank has used its premises during all this time. There is nothing upon which the bank could recover, because the bank has enjoyed all of its premises during the whole period of time.

82 I therefore move to direct a verdict for the defendant; or, if it should be considered that there is a technical cause of action, I move separately that the jury be directed to render a verdict for nominal damages only, and I make each of said motions upon all the grounds stated."

The court denied each of said motions.

To each of said denials of the court to direct a verdict for defendant and to direct a verdict for plaintiff for nominal damages only counsel for the defendant did then and there separately and respectively duly except.

83 Second exception.

The said plaintiff having rested its case and the said motions having been denied, Mr. Anderson, of counsel, having opened the case for the defendant, and having called as a witness SAMUEL H. HURD, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

I am acquainted with the building occupied by and belonging to the Fifth National Bank, corner of Third avenue and Twenty-third street. I was a tenant of a part of that building from about the spring of 1876, I think, until about two years ago. I was receiver of the Third Avenue Savings Bank. I occupied the southerly front basement of the bank building. The business transacted there was my business as receiver in keeping the books and closing the accounts of the Third Avenue Savings Bank. I was there for seven or eight years. I was there while the railroad was being constructed and afterwards.

Q. State what effect the construction of the railroad had upon the light in that basement.

A. I do not think that the light was materially affected by the structure.

Q. The structure itself I am inquiring in regard to?

A. Yes, sir.

Q. You continued to pay the same rent until you left?
84 A. Yes, sir.

In answer to Mr. ARNOUX:

Cross-examination:

Q. Did you ever ask to have it reduced?
A. I think I did.
Q. Upon what reason?
A. Upon no special reason excepting to get it reduced.
Q. To the best of your recollection, wasn't it after the coming of the elevated railroad that you asked to have it reduced?
A. I think it was.

And the said defendant having called as a witness LINCOLN MOSS, a civil engineer, who testified in part as follows, in answer to Mr. ARNOUX:

Cross-examination:

Q. Isn't there under the track at the Twenty-third-street station a pan which extends south to the Fifth National Bank, to prevent any cinders falling from the ash-pans to the street?
A. There is a pan there, but not for catching cinders; it is for keeping drippings and the like in.
Q. Doesn't that pan extend beyond the structure of the bank?
A. I wouldn't like to say, because I haven't made the measurement of it.
Q. What is your best recollection?
85 A. I think one end would have to come in front of the bank, but which side I wouldn't like to say.
Q. Isn't that pan put far enough along to catch any drippings that might fall from the locomotives as they stand on the track at the station?
A. Well; they are usually placed so; I couldn't say about that one.
Q. And does not the locomotive stop the train so that the locomotive stands beyond the Twenty-third-street station?
A. Yes, sir.
Q. And is it not your best recollection that the pan runs along the front of the bank building and to the southward?
A. My impression is, about ten or twelve feet of the pan is in front of the bank proper, but that it does not extend the whole length of it.
Q. Of that you are not positive?
A. I am not positive; I have never measured.
Q. The locomotive always stands beyond the platform?
A. I couldn't say that it always does.
Q. But isn't that the rule of the road with regard to running locomotives, to stand beyond the station?
A. I don't know of any such rule.
Q. I don't mean as an adopted rule, but as a principle of running the road?
A. Yes, sir.

86 Q. And do they not generally carry the train so far that the front platform of the front car of the train cannot be entered from the station?

A. Frequently.

Q. And the pan is intended to run far enough along down to catch everything that falls from the locomotive?

A. Not specially.

Q. Isn't it to catch any drippings that fall from the locomotive?

A. Yes.

Q. From the locomotive or the trains?

A. From the locomotive or the structure itself.

Q. Consequently do they not, in all instances, run the pan beyond the end of the station?

A. Not always.

Q. What station do you know on the elevated railroad in the city of New York that the pan does not run beyond the platform?

Counsel for the defendant objected to this question as immaterial. The court overruled the objection.

87 A. I have no distinct knowledge; but my impression is that there are a great many stations where there is no pan at all.

Q. I ask you to name a station that you know has a pan where the pan doesn't extend far enough to reach anything that might drip from the locomotive, provided the locomotive stands beyond the platform?

A. No; I can't say that positively.

By Mr. ANDERSON: You are a civil engineer?

A. Yes, sir.

By Mr. ARNOUX: Are you regularly in the employ of the elevated railroad?

A. I am

88 Third exception.

And the said defendant also called as a witness HALL J. HOW, a real estate broker and appraiser, who testified in part as follows, in answer to Mr. ANDERSON:

Redirect examination:

Q. I want to know whether, assuming a reduction of rentals of the apartment portion of the bank building in 1878 or since, there is any cause for such depreciation of rents which you, as a real-estate man, can present or as to which you have a judgment.

A. I do know of a reason.

Q. Please state any reason therefor.

A. My reason is that flats better adapted for the people who would wish to live in so fine flats as those above the bank have been erected in better localities, where people would naturally prefer to live than to live on the corner of Third avenue at such high rents as they

would have to pay for such fine flats. That is one cause why these rents have had to be depreciated in value.

Q. Has there been, during the past ten years, a large accession of flat houses or houses where stories above the stores are occupied as residences upon the Third avenue in different parts upon the line of the railway?

A. There have been a great number built since 1878.

Q. Can you state about what the average rental of such
89 flats is, taking the story first above the store?

Counsel for the plaintiff objects to the question on the ground that it includes the whole length of Third avenue and is not confined to the neighborhood of the bank.

The court sustained the objection on the ground that the question should be confined to the vicinity of the bank; to this ruling and decision of the court the counsel for the defendant then and there duly excepted.

Fourth exception.

And the said defendant also called as a witness WILLIAM E. HAWES, a real-estate broker and appraiser, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

Q. What, in your opinion, is the effect of the elevated railroad structure upon the rental value of the upper portions of the bank—that portion of the bank above the banking offices? In that question I exclude any running of cars and anything connected with the operation of the road, such as gas, smoke, atmosphere, cinders, &c.

A. I do not think it has any effect.

Q. Now, assuming there was a diminution in rents in the spring of 1878, would you, from your experience as a real-estate man, be able to assign any cause for this diminution?

90 A. Yes, sir.

Q. What?

A. There was a general diminution of rents and of values occasioned by the panic in 1872, and it culminated in the fall of 1879, and it was felt in this neighborhood I think about that time—about 1878 and 1879.

Q. Is there any other reason for it?

A. The increase in this class of buildings father up town.

Q. There was an increase in apartment houses?

A. Yes, sir; subsequent to 1877 and 1878.

Q. Has there been a large increase in the number of apartment houses in Third avenue?

A. Yes, sir; there has.

Q. Are you acquainted with the rental values of any flats upon Third avenue, in the vicinity of this bank?

A. Yes, sir.

Q. How far distant?

A. This No. 368, that I sold last month.

Q. And what is the character of those flats; are they flats above a store?

A. Above a store.

Q. Were they a good quality of flats?

A. A fair quality; better than the ordinary run of Third-avenue flats; not as good as these.

Q. What were the rental values?

Counsel for the plaintiff objects to this question as irrele-
91 vant and immaterial.

The court sustained the objection, and to this ruling and decision of the court excluding this testimony the counsel for the defendant then and there duly excepted.

Fifth exception.

The said defendant also called as a witness FRANCIS H. KIMBALL, an architect, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

The building of the Fifth National Bank, at the corner of twenty-third street and Third avenue is what is known as a high-stoop building—that is, there is a flight of steps leading up to the first floor from Third avenue, in the center of the Third-avenue front, and the first floor is eight feet above the sidewalk—quite a number of steps to go up.

Q. Did you examine to see the style of architecture and the purpose of the architectural devices?

A. I did.

Q. Please state to the jury what they are, if you drew any deductions as to the desks in the building.

A. The first story proper is used as a bank. The arrange-
92 ment of counters I have down on this sketch, and the source of light is entirely from the Twenty-third-street side; very little comes from the front. This arrangement takes its light from Twenty-third street, owing, in the first place, to its being a narrow building, and also by the fact that this stoop takes up a greater part of the Third-avenue side—that, with the screen and side stoop branching up each side; and on the Twenty-third-street side there are seven windows entirely used in the bank, the private office of the desks being at the extreme end on Twenty-third street. In front, on Third avenue, are two windows, and at those two windows are two desks—the ordinary check desks in a bank—for tellers.

Q. Will you state to the jury what the permanent structure, leaving out any action of running trains, has upon the light or lighting of that building?

A. I went into the bank and spent a few moments. In fact, I have made several examinations, both when there were no trains there and when there were trains there, and I could detect no material change in the light. The light was so strong from the Twenty-third

street side that I could detect no difference—that is, from the light coming in from the Third-avenue side.

In answer to Mr. ARNOUX:

Cross-examination:

Q. About how much would it cost to put up that bank building?

A. I hesitate somewhat before I state the price of a build-
93 ing like that.

Q. Say, at least, it would cost how much?

A. I should say it cost anywhere from fifty to seventy-five thousand dollars.

Q. Wouldn't it cost over a hundred thousand dollars?

A. I don't think it would, sir.

Q. You say from fifty to seventy-five thousand?

A. I thould think so—that size. I am building buildings now for about that sum.

Q. What style of architecture is this building?

A. Well, I presume it would be more what is called a French Renaissance building.

Q. Is it customary in the city of New York for people to put up handsomer buildings on corner lots than on the inside lots, as they are commonly termed?

Counsel for the defendant objects to this question as irrelevant and immaterial.

The court overruled said objection, and to this ruling and decision of the court allowing this question the counsel for the defendant did then and there duly except.

A. Yes, sir. It is not the custom; sometimes they do.

Q. I am not asking you about what they do sometimes. I am asking you if it isn't customary to put up handsomer buildings on the corner than it is on inside lots.

94 A. No, sir.

Q. Is it customary to put up handsomer buildings on the interior lots than it is on the corner?

A. No, sir. It depends upon the owner. There are very few good corner buildings.

Q. You say you built the Casino?

A. Yes, sir.

Q. Now, that is a very handsome building?

A. Yes, sir; but the one on the corner isn't.

Q. Now, I didn't ask you anything about the corner. I move to have that stricken out.

The COURT: It may be stricken out.

Q. Is the Casino built on the corner?

A. Yes, sir.

Q. What other large building was it you said you put up?

A. Madison Square theatre.

Q. Is that on the corner?

A. No, sir.
Q. That is an inside building?
A. Yes, sir.
Q. You think there is no rule in the city of New York that corner buildings are finer than the adjoining buildings?
A. No, sir; I think not. The Metropolitan Opera House is on the corner, and that is a fine building; and diagonally across from the Casino—that is the other case which you stopped me from saying—that is only a plain, ordinary building. It depends upon the owner.

Sixth exception.

The said defendant having called as a witness EUGENE
95 SOULLEYET, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

Q. Did you any day in this year make an examination or make a count of the vehicles passing up and down Twenty-third street and Third avenue, at the junction of Twenty-third street and the avenue?
A. I did.
Q. Which was it—the street or the avenue?
A. On the avenue, and a portion of the day on Twenty-third street.
Q. That was an ordinary day—no special occasion?
A. On a Saturday.
Q. No special event—no anniversary or anything of that sort?
A. No.
Q. How many vehicles passed up and down?
A. On Third avenue there were 1,423 passed up and down.
Q. And on Twenty-third street?
A. From the time I was there—that was between the time—during the absence of my associate to dinner and to supper there were forty-three passed up and down on Twenty-third street, making a total of 1,516.
Q. Were these vehicles of all kinds?
A. Of all kinds.
Q. That was exclusive of the cars?
A. I didn't count the cars at all.
96 Q. In addition to that, were cars passing and repassing constantly?
A. Yes, sir.
Q. How long have you been living in New York?
A. Going on forty-nine years.
Q. Have you been acquainted with the Third avenue and Twenty-third street?
A. I know the location, passing and repassing.
Q. And vehicles have passed and repassed on Third avenue, as you saw them on that occasion, and on Twenty-third street?
A. Yes, sir.

And the said defendant having called as a witness THEODORE MONDELL, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

Q. Did you, on the same day, with Mr. Soulleyet, while he was attending Third avenue, make a count of the vehicles passing up Twenty-third street?
A. Yes, sir.
Q. At the junction of Third avenue?
A. Yes, sir.
Q. Passing up and down Twenty-third street?
A. Yes, sir.
Q. What was the number of those vehicles as counted by you?
97 A. 836.
Q. Were they all kinds of vehicles?
A. Yes, sir.
Q. Have you the different kinds of vehicles?
A. Yes, sir.
Q. Please give that as noted by you.
A. Ice wagons, nineteen; delivery wagons, four hundred eighteen; cabs, twenty-three; coaches, sixteen; carts, one hundred ninety-eight; trucks, one hundred and nineteen; express wagons, thirty; market wagons, thirteen.

And the said defendant having called as a witness JOSEPH P. ALLEN, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

I have been by occupation a driver and conductor on the Third-avenue railroad, off and on, for the past eight years, before and since the elevated road was constructed.
Q. Is the avenue used for the passage of vehicles up and down as it was before—the same character of vehicles—and is it a crowded avenue?
A. Well, I think it has improved the avenue, so far as traveling is concerned.
Q. You think it has increased since the railroad came there considerably?
98 A. I do; yes, sir.

In answer to Mr. ARNOUX:

Cross-examination:

Q. You don't mean to say that you think the elevated structure has attracted any driving on Third avenue, do you?
A. I say it has attracted traffic.
Q. That is the natural growth of the city, isn't it?
A. Yes, sir.
Q. Now, those posts that are run down into the street don't help travel very much, do they?

A. Well, they don't interfere with it, as I see.

Q. Don't you think there is a great difference in the number of private carriages that go up and down Third avenue since the elevated road was built than there used to be?

A. I never took notice of that.

And the said defendant having called as a witness HERMANN STEMMLER, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

I have charge of the passenger traffic of the elevated railroad. The number purchasing tickets there and leaving on the trains in May, 1882, were 86,259; in May, 1883, were 88,920; in May, 1884, were 90,932; in May, 1885, were 99,408; and last month, 1886, were 119,079. For the fiscal year ending September 30, 1883, on the up and down station, the number purchasing tickets and
99 passing through were 1,628,135; in 1884, 1,648,684; in 1885, 1,732,270.

The said defendant thereupon called as a witness CHARLES F. CHANDLER, professor of chemistry at the School of Mines and Columbia College, and also of the College of Physicians and Surgeons and College of Pharmacy, and who for six years had been chemist to the health department and for ten years president of the department, who testified in part as follows, in answer to Mr. ANDERSON:

Direct examination:

I carefully surveyed the premises in suit on the exterior, both on Twenty-third street and on Third avenue. I examined particularly the different offices in the basement with a view to ascertain how large a proportion of the light is intercepted by the railroad structure. I examined the bank floor very carefully to see to what extent the structure of the railroad interfered with the entrance of light on the floor on which the bank is located. I looked at the other stories well from the outside. I found that the railroad structure intercepts about ten per cent. of the light that enters the basement—that is, the basement of the building loses about ten per cent. of its light on account of the railroad structure. Carefully examining each window by itself to see how much of the light is cut off from
100 it and then taking an average for all the windows on the basement, it came to ten per cent. Then the bank floor I examined in the same way. Studying each window and the interception of light, I find the bank floor loses less than four per cent. The railroad structure intercepts less than four per cent. of the light that falls upon the windows of the bank floor. The remaining—second, third, and fourth—stories lose no light.

A. The second story loses no light; the third story loses no light; the fourth story loses no light; so, the basement losing ten per cent., the bank losing less than four per cent., and the other three stories losing none, the average loss of light, the total loss of light, for the building is less than four per cent.

Q. Did you observe the building on the opposite side of the avenue?

A. I did.

Q. Supposing the building upon the opposite side of the avenue were raised to the height of the bank building, what effect would that have upon the percentages of light in the bank building, upon the banking floor and below?

Counsel for the plaintiff objects to this question upon the ground that this suit is not with reference to the opposite corner.

101 The court sustained said objection, and to this ruling and decision excluding this question the counsel for the defendant then and there duly excepted.

Seventh exception.

During the course of said examination of the said last-named witness the said witness was further questioned by counsel for defendant as follows:

Q. Supposing the building on the opposite side of the avenue be erected to the height or one raised to the height of the bank building, the bank of the plaintiff, would the structure of the railway intercept any sunlight on the bank at any hour of the day?

Counsel for the plaintiff objected to said question.

Counsel for the defendant said:

I will state that I intend to prove by this examination that if the building on the opposite side of the avenue were erected to the height of the bank that no rays of the sunlight would be intercepted at any hour of the day by the railway structure in front of the bank.

The court sustained said objection, and to this ruling and decision excluding this testimony the counsel for the defendant then and there duly excepted.

102 Eighth exception.

And said last-named witness having further testified as follows, in answer to Mr. ANDERSON.

Direct examination:

Q. You spoke of a difference of 4½ per cent., I think, in the bank building. Can the human eye appreciate the difference in illumination?

A. It cannot; it is entirely inappreciable.

Q. Supposing I were sitting in this room with a light coming in, would my eye notice a depreciation or dimunition of four per cent.?

A. Not at all; it is absolutely impossible; it is the difference between 24 candles and 25 candles in lighting a room.

Q. It wouldn't be appreciated?

A. No one could tell whether there was one candle more or one candle less burning in the room with twenty-five candles burning.

Q. How large a portion of the day does the sun shine, when it is a sunshiny day, upon the building?

A. I carefully considered that question, and I concluded that from five-eights to three-quarters of the day, when the sun shines, it shines on that building. The building is so located, the avenue
103 not running north and south—it is so located that the sun shines on the building very soon after sunrise. The sun rises at such an oblique point opposite the building that the railroad structure itself hardly cuts the sun off for any length of time. Perhaps very early in the morning, just after sunrise, in the summer, when the sun rises pretty well around that way, it cuts it off; but during business hours the sun is not intercepted by the station itself from falling on the building, so that it is only light in the afternoon when the sun is around behind the building that it doesn't shine on the front.

Q. Now, I will ask you, from your experience connected with the public buildings and the lighting of them, whether this railroad structure above the station and trackway, with whatever is there permanently, practically interferes with the lighting of that building?

A. It does not.

Q. You examined the bank with its outside surroundings?

A. I did.

Q. Is there anything there which interferes with the access to the building?

A. There is not.

Q. Is there anything that interferes with the ventilation of the bank or with the circulation of air—with the proper, due, and adequate circulation of air for all purposes?

104 A. There is not.

The said defendant thereupon recalled one of its witnesses, namely, HALL J. HOW, who was questioned by defendant's counsel as follows:

Q. I will ask whether the value of this property at the corner of Twenty-third street and Third avenue has increased since the coming of this railroad structure?

Counsel for plaintiff objected to said question.

The court sustained said objection, and to this ruling and decision of the court excluding said testimony the counsel for the defendant then and there duly excepted.

105 After further testimony had been given on behalf of the defendant and after defendant had rested, counsel for defendant moved to direct a verdict for defendant, because no facts had been shown sufficient to constitute a cause of action against the defendant.

The court denied this motion; to such denial of the court to direct a verdict for defendant counsel for defendant did then and there duly except.

Counsel for the defendant thereupon moved that the jury be directed to render a verdict for plaintiff for nominal damages only.

The court denied this motion; to such denial of the court to direct a verdict for plaintiff for nominal damages only counsel for defendant did then and there duly except.

The case was thereupon summed up for the defendant and for the plaintiff, and the court charged the jury as follows:

"GENTLEMEN OF THE JURY: I would remind you, gentlemen, in view of some of the discussion and remarks of counsel, that we
106 are to try merely this case without reference to the trial of any other case or the verdict in any other case or the verdict that has been previously rendered in this case, but upon the evidence which has been given to us here in court and nothing else.

"The plaintiff built this bank building at the corner of Twenty-third street and Third avenue, I think in 1874. Now, the avenue and the street had, before that time, been laid out and opened. The land under this street and under the avenue belonged to the city of New York under the proceedings and law, as I understand it. They owned the land in the avenue and in the street, subject to this provision made in the law under which both the street and avenue were laid open and made an avenue and a street, "in trust, nevertheless, that the same be appropriated and left open for or as a part of a public street, avenue, square, or place forever," as other streets are to be left open.

"Now, that put upon the land in the street the burden of always being kept open as a public street, according to the language of that law, which is "forever;" so that when the bank built its building there it had the right to understand and to expect and to have these two streets—that is, the street and the avenue always remain open as streets.

107 "Now, if they have remained open streets until the present time, notwithstanding what the defendant did by putting up this structure, then the plaintiff has no case. If the street and avenue have not remained open as public streets, then the plaintiff may have a case.

"So the first question for you to pass upon is, Whether the avenue and street have remained open as public streets notwithstanding this structure; or, Whether the structure as put up has made them cease to be open streets and become something else.

"Now, you know what a public street is—a street for persons to pass over with all kinds of vehicles which they may choose to pass with, or in which foot passengers pass as they may choose to, in all directions, everywhere in the street. That is a public street—one that is open to all kinds of passengers; open upwards from its grade; not an enclosed street upwards, but an open street. If this had remained that, which is a question I leave to you, then you may return a verdict for the defendant without further inquiry.

"But if this structure—and I am not speaking now of the running of trains, but the structure itself—the depot, the platform, the enclosed house, and the railroad track are such permanent things in the way of the street as an open street as to make it cease to be an open street, or cease in a measure to be an open street, and

so to subvert it from an open street into something else at the place, then the plaintiff may be entitled to recover.

"You are to decide that question in your own minds as to whether they have changed this street from an open street to something else by erecting this structure.

"If they have, then the next question will be, Whether that erection has materially damaged this plaintiff.

"If you find that it has, then the plaintiff is entitled to recover; if not, then the plaintiff is not entitled to recover, for, although the defendant may have subverted the use of the street, the plaintiff has no claim unless he has been materially damaged by what has been done in that respect which obstructs it.

"So that, in order to determine which way your verdict may be, you must decide these two questions: First, Whether the street has ceased to be an open street by reason of the erection of this structure by the defendant; secondly, That such erection has damaged the plaintiff.

"If you find both of these questions in favor of the plaintiff, then your verdict is to be for the plaintiff; otherwise for the defendant. I think you will understand that.

"Now, then, if you find a verdict for the plaintiff, you must allow the plaintiff such damages as it has sustained by reason of the erection of this structure which has subverted the street, from the time it was put up until now. You will allow the plaintiff a fair compensation in damages for what it has been injured in the enjoyment of this building from the time when this structure was put up, in 1878, up to this present time.

"In the first place, there is a part of the building occupied by the bank itself as a bank. As I understand it, that part has been occupied by the bank for banking purposes during all this time. Now, if this structure was unlawfully there, what injury has it been to the bank by being there during that time, in the way of hindering access to that part of the building—that is, in the way of hindering access of persons going to and departing from that part of the building itself—if anything? What has it been in the way of diminishing the light to that part of the building and in the way of diminishing air to that part of the building?

"On this subject I am not aware of any testimony as to any direct pecuniary damage, except by being compelled to use gas and the expense of the gas. If that was in consequence of the structure and the structure was unlawfully there, then the plaintiff must be allowed for that.

"But that may not be all. If there were other discomforts and inconveniences in the occupation of that part of the building in consequence of the structure in these respects, the plaintiff may be entitled to recover a fair compensation for the damage occasioned by that, such as you shall see fit to award in the exercise of your good judgment and sound discretion. It is not given to us in round sums, cash value, by witnesses, but you, as jurymen and as men of good sense and sound judgment, are to estimate it. How much less was the use of that part of the building worth as a bank on account

of this structure being there? They are entitled to so much for the damage to so much of the bank building as is occupied by the bank itself for banking purposes.

"As to the rest of the building, as I understand it, it has all the time been in the occupation of tenants. The inconvenience, if any, has been suffered by the tenants. If the bank has suffered anything, it has been in the reduction of its rents.

111 "Now, if the rents of the bank have been lessened in consequence of this structure and the injury it brought to the parts of the building rented, the bank is entitled to recover what it has lost, and the interest on that from the time of the loss until now. As to this you ought to be governed wholly by the loss on account of the structure itself. If these tenants of the bank have forced a reduction of the rents on account of this structure itself, as shown to you by the evidence, then you are to allow the bank so much as their rents have been reduced.

"Some of the witnesses have said that the noise and smoke and gas and steam were objections. If any reduction was made on account of those the defendant is not liable for that. The defendant is only liable for the reductions on account of the structure itself—the permanent structure standing there in the avenue and the street.

"And so with the claim of the bank for damages on account of the part occupied by it.

"Nothing is to be given on account of any inconvenience occasioned by the noise or the running of trains, or smoke, or cinders, or steam, or gas, or any of those things connected with the running of the train, but you are to be confined simply to the structure itself as it stands there.

112 "Perhaps I ought to state to you that the arrangement of the bank building was such as they chose to make. Something has been said about its being so arranged as of itself to obstruct the light. Of course they have no claim for damages on account of any loss that might be occasioned by their own structure, for they made it as they chose. They had a right to make it as they chose and have it open on an open street. If the defendant has unlawfully deprived them of the right to have it open onto an open street and have lessened their light or air or access by that means, then they are entitled to recover what they have lost in that way, notwithstanding their building may have been so arranged as to lose some of these advantages by the form of its structure.

"It does not occur to me to make any further comment to you. The case seems to be a simple one. You have these questions to decide: In the first place, Whether this is left to be an open street or not, with this structure there; and, if not, then Whether the structure materially damages the plaintiff. If it does, then your verdict should be for the plaintiff; and if there is a verdict for the plaintiff, then you are to allow the plaintiff a fair compensation for what the plaintiff itself has lost on account of the structure merely being there. It had the right to have the open street. If it had an open street and has had an open street up to the present time, it

113 has no claim. If it has not had an open street it has a claim

if the thing which obstructed the street has damaged it, and it is entitled to the damage which that obstruction has occasioned.

"That is the case, gentlemen, and you may take it and return such verdict as seems to you to be right."

To the ruling and instruction in the foregoing charge to allow the plaintiff such damages as it has sustained by reason of the erection up to that present time the counsel for the defendant did then and there duly except.

And to so much of the foregoing charge as relates to the right to recover for other discomforts and inconveniences than being compelled to use gas to so much of the bank building as is occupied by the bank itself for banking purposes the counsel for the defendant did then and there duly except.

114 Counsel for the defendant, at the termination of the judge's charge to the jury, did then and there request the court to charge as follows:

"Plaintiff is not entitled to recover in this action for loss of rents or of rental value. The recovery in this action, if at all, must be for permanent injury to the plaintiff's property by the defendant's interference with the easements of light and air."

The court declined to charge as requested in the foregoing request to charge.

To this ruling and to this refusal of the court to charge as requested counsel for the defendant did then and there duly except.

Instructions upon the other issues of the case having been given by the court, the jury retired, and on the same day, being the fourth day of June, 1886, the jury returned a verdict in favor of the plaintiff for the sum of five thousand dollars.

And, inasmuch as the foregoing several matters of law and the said several rulings, instructions, and decisions of the court
115 do not appear upon the record of the trial, therefore, on the prayer of the said defendant, by its said counsel, the said judge has signed the foregoing as and for the bill of exceptions in this said cause as of the fourth day of June, 1886, the day said verdict was rendered.

HOYT H. WHEELER.

116 [Endorsed:] United States circuit court, southern district of New York. The Fifth National Bank of the City of New York against The New York Elevated Railroad Company. (Copy.) Bill of exceptions. Davies & Rapallo, attorneys for defendant, Mutual Life building, 32 Nassau street, New York city. Service of a copy of the within bill of exceptions as proposed by defendant, appellant, and of a notice, of which a copy is endorsed hereon, is this day admitted. Sept. 18, 1886. Kelly & MacRae, pl'ff's att'ys. U. S. circuit court. Filed Sept. 27; 1886. Timothy Griffith, clerk.

GENTLEMEN: You are hereby notified that the within is a copy of defendant's proposed bill of exceptions, and that the same will be sent, for his signature and approval, to the Honorable Hoyt H.

Wheeler, judge, at Brattleboro', Vt., on the 22nd day of September, 1886.

Dated New York, September 18th, 1886.

____ ____,
Defendant's Attorneys.

To Messrs. Kelly & MacRae, plaintiff's attorneys.

117 Supreme Court of the United States.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
vs.
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said Court, at the Capitol, in Washington, comes the said plaintiff in error, by Davies & Rapallo, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that it, the said plaintiff, may be restored to all things which it has lost by occasion of said judgment, &c.

New York, Sept. 28th, 1886.

DAVIES & RAPALLO,
Attorneys for Plaintiff in Error,
32 Nassau St., New York City, N. Y.

To Messrs. Kelly & MacRae, attorneys for defend't in error, 237 Broadway, New York city, N. Y.

118 [Endorsed:] United States Supreme Court. The New York Elevated Railroad Company, plaintiff in error, *vs.* The Fifth National Bank of the City of New York, defendant in error. Assignment of errors. Davies & Rapallo, att'ys for pl'ff in error, 32 Nassau St., New York city, N. Y. Service of a copy of the within assign't of errors is hereby admitted. Dated New York, Sept. 28, '86. Kelly & MacRae, att'ys for def't in error. U. S. circuit court. Filed Sept. 28, 1886. Tim'y Griffith, clerk.

119 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
vs.
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Bond for Damages and Costs.

Know all men by these presents that we, Jay Gould, residing at No. 579 Fifth avenue, in the city, county, and State of New York, and Russell Sage, residing at No. 506 Fifth avenue, in the city, county, and State of New York, are held and firmly bound unto the above-named Fifth National Bank of this city of New York in the sum of ten thousand three hundred and twenty-five and $\frac{14}{100}$ dollars, to be paid to the said Fifth National Bank of the City of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of ——, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-named New York Elevated Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named New York Elevated Railroad Company shall prosecute the said writ of error to effect and answer all damages and costs, including just damages for delay, if said New York Elevated Railroad Company fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAY GOULD.
RUSSELL SAGE.

Sealed and delivered and taken and acknowledged this second day of September, 1886, before me—
TIMOTHY GRIFFITH,
U. S. Commissioner.

120 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Jay Gould, residing at No. 579 Fifth avenue, in the city, county, and State of New York, and Russell Sage, residing at No. 506 Fifth avenue, in the city, county, and State of New York, being duly sworn, depose and say, and each for himself deposes and says, that he is worth the sum of twenty-five thousand dollars over and above all his just debts and liabilities.

JAY GOULD.
RUSSELL SAGE.

Sworn to this second day of September, A. D. 1886, before me—
TIMOTHY GRIFFITH,
U. S. Commissioner.

Approved as to form, amount, and efficiency [sufficiency] of the sureties.
N. Y., Sept. 3, 1886.
WILLIAM J. WALLACE, *Judge.*

[Endorsed:] Vol. —, page —. U. S. circuit court. The New York Elevated Railroad Company, plaintiff in error, *vs.* The Fifth National Bank of this city of New York, defendant in error. Bond for costs, damages, &c., on —. ——— ———, proctor. U. S. circuit court. Filed Sept. 4, 1886. Timothy Griffith, clerk.

121 U. S. Circuit Court for the Southern District of New York.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
against
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Affidavit of Service.

CITY AND COUNTY OF NEW YORK, *ss:*

Emile Cohen, being duly sworn, says: I am of the age of nineteen years and upwards. On the fourth day of September, 1886, at corner 23rd street and 3rd avenue, in the city of New York, I served the annexed citation on the defendant in error by delivering a copy thereof to the cashier of said def't in error, personally, and leaving the same with him, at the same time showing him the annexed citation and the signature of the Hon. Wm. J. Wallace, thereto subscribed. I know the person served as aforesaid to be the cashier of the bank mentioned and described in said citation as the defendant in error herein.

EMILE COHEN.

Sworn to before me this fourth day of September, 1886.
WM. H. WOODHULL, No. 133,
Notary Public, N. Y. City.

122 U. S. Circuit Court for the Southern District of New York.

THE NEW YORK ELEVATED RAILROAD COMPANY, Plaintiff in Error,
against
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, Defendant in Error.
} Affidavit of Service.

CITY AND COUNTY OF NEW YORK, *ss:*

Albert J. A. Friedmann, of the city of New York, being duly sworn, says: I am of the age of sixteen years and upwards. On the fourth day of September, 1886, at No. 237 Broadway, in the city of

of New York, I served the annexed citation on Mr. Kelly, one of the attorneys for the defendant in error herein, by delivering a copy thereof to said attorney, personally, and leaving the same with him, at the same time showing him the annexed citation and the signature of the Hon. Wm. J. Wallace, thereto subscribed. I know the person served as aforesaid to be the attorney for the bank mentioned and described in said citation as the defendant in error herein.

ALBERT J. A. FRIEDMANN.

Seal Andrew A. Henderson, Notary Public, New York Co. Sworn to before me this fourth day of September, 1886.

ANDREW A. HENDERSON,
Notary Public, N. Y. Co.

123 UNITED STATES OF AMERICA, *ss:*

To The Fifth National Bank of the City of New York, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein the New York Elevated Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated N. Y., Sept. 3rd, 1886.

WM. J. WALLACE, *Judge.*

[Endorsed:] E. S. R. U. S. Supreme Court. The New York Elevated Railroad Company, plaintiff in error, against The Fifth National Bank of the city of New York, defendant in error. Citation. Davies & Rapallo, attorneys for plaintiff in error, 32 Nassau St., N. Y. city. 25, p'd. Due service of a copy of the within citation is hereby admitted this 4th day of Sept., 18'6. ——— ———, att'ys for def't in error. U. S. circuit court. Filed Sep. 4, 1886. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 380. The New York Elevated Railroad Company, plaintiff in error, *vs.* The Fifth National Bank of the City of New York. Filed October 1, 1886.

Office Supreme Court U. S.
FILED,
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JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK ELEVATED RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant in Error.

POINTS FOR PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD S. RAPALLO,
Of Counsel for Plaintiff in Error.

DAVIES & RAPALLO,
Solicitors for Plaintiff in Error.

C. G. Burgoyne's Printing Business, Cor. Centre and Walker Sts.,

Supreme Court of the United States,

OCTOBER TERM, 1889.

THE NEW YORK ELEVATED RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case comes to this Court upon a writ of error, filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, to review a judgment obtained by the Fifth National Bank of the City of New York against the New York Elevated Railroad Company, obtained upon a verdict of the jury.

The action was brought by the service on the 5th day of March, 1888, of the summons and complaint upon the original defendant, the New York Elevated Railroad Company. The action was brought to recover damages of the original defendant, which the plaintiff,

claiming to be duly incorporated under the Laws of the United States for the formation of banking associations, alleged that it had sustained by reason of the alleged wrongful acts of the original defendant (see Complaint, pp. 3 to 5 of Record).

The original plaintiff in its complaint claimed that for many years prior to the bringing of the suit it was the owner in fee of the buildings, lands and premises known as 300 Third avenue, in the City of New York, situated on the southwest corner of Third avenue and Twenty-third street, the building having a front of twenty-five feet on the avenue; that Twenty-third street and Third avenue were public streets, and that the plaintiff had an easement and interest therein free from obstructions and nuisances; that in said building and premises the plaintiff for five years had carried on a general banking business and had leased and rented to other persons the upper and other parts of the building for business and other purposes, receiving compensation therefor; that by reason of the defendants having on or about the first day of January, 1878, wrongfully and without plaintiff's consent built a large station or depot with its appurtenances on the street and avenue near to plaintiff's bank building, the use, enjoyment and value of plaintiff's premises had been greatly interfered with by the obstruction of the light and air to the premises, and that the track of the original defendants' elevated railroad, on Third avenue, in front of the original plaintiff's bank and premises, and close thereto, obstructed and interfered with and lessened the air and light to the same to a serious and injurious extent. The original plaintiff further alleged that on or about the first day of August, 1878, the original defendants began to run trains upon the track of the structure in Third avenue, and thereby interfered with the use, comfort and enjoyment of the building and premises, compelling the tenants to vacate the same, by which the rents

and profits of the building were reduced, and that the permanent use and value of the building and premises of the original plaintiffs had been seriously injured by reason of the jarring, concussion, motions and vibrations caused to the building, and by the locating of the station and depot near original plaintiff's property, and by the running and use of the engines and cars, so that the use and enjoyment of the premises, as the original plaintiff alleged, was injuriously obstructed and interfered with, in the market and rental value of the premises, had been and would be in the future greatly damaged, reduced and greatly impaired, and that no compensation had been made to the original plaintiff by the original defendant.

The original defendant answered, admitting that it had erected a station at or near the corner of Third avenue and Twenty-third street; denying that the original plaintiffs had any interest or easement in Third avenue or Twenty-third street, except as they might share the same with the public at large; alleging that the railway and structures complained of were duly authorized and were in conformity with the statutes of the State of New York, setting out the statutes under which the plaintiff in error was authorized to erect its elevated railroad in the streets of New York; claiming that all proceedings of the plaintiff in error were under the statutes referred to and that the Railroad Company was duly authorized to erect its railway and station near or contiguous to the plaintiff's property, and denying all the other allegations of the complaint (see Answer, pp. 6 and 7 of Record).

The action was brought to trial before Hon. NATHANIEL SHIPMAN, and a jury, and a verdict obtained against the original defendant for the sum of $6,000. The Railroad Company then moved for a new trial, which was granted by the learned Judge who had tried the case, on the ground that in his own opinion he had not left with suf-

ficient clearness to the jury the question to be passed upon by them whether or not by the erection of the new and permanent structure of the railway company, a new and inconsistent use was imposed upon the street, although the travel was practically unimpeded, and light in the traveled way was not sensibly diminished and the street was not actually at that point made inconvenient for the accommodation of persons or vehicles.

The learned Judge held that in order to find for the plaintiff, the jury must be of opinion that substantial obstructions had been placed upon the travel on the street, and that it was thereby rendered inconvenient to the public as a highway, and that the jury could not come to that opinion merely from the fact that a permanent structure had been placed in the street, and that the defendant was entitled to have the question for them to pass upon left with more distinctness to the jury than it had been upon the occasion of the trial (see Opinion of Judge SHIPMAN, pp. 10 to 13 of Record).

An order was then entered granting the motion for a new trial, and setting aside the plaintiff's verdict (see Order, p. 14 of Record).

The second trial was completed on June 4th, 1886, at which time the jury found a verdict for the original plaintiff in the sum of $5,000.

A motion was made on the 23d of August, 1886, to set aside the second verdict and for a new trial, which was determined against the original defendant (see Order, p. 18 of Record), and on the 26th of August, 1886, judgment was entered in favor of the Fifth National Bank against the plaintiff in error for the sum of $5,161.97 (see Judgment, p. 19 of Record), whereupon the plaintiff in error procured to be signed a bill of exceptions (see Bill of Exceptions, pp. 19 to 47, inclusive, of Record).

On September 28th, 1886, the plaintiff in error duly assigned errors (see p. 48 of Record); and presented its

writ of error with proper citation (see writ of error, p. 2 of Record, and Citation, p. 51 of Record).

Judgment was entered for $5,068.33, besides costs. A motion made by defendant in error to dismiss this writ of error, has already been denied by this Court.

Questions involved and the manner in which they are raised:

The Fifth National Bank makes no claim to own the fee of either Third avenue or Twenty-third street (see Complaint, paragraph IV.). This street and avenue were opened as public streets by appropriate proceedings and the fee of the soil vested in the Mayor, Aldermen and Commonalty of the City of New York. The City of New York became the owner of both the street and avenue "in trust, nevertheless, that the same be appropriated and left open for or as a part of a public street, avenue, square or place forever, as other streets are to be left open" (see charge of Judge WHEELER, p. 44 of Record).

The Statute of New York which provides for the opening of streets in the City of New York is Chapter 86 of the Laws of 1813. Section CLXXVIII. provides that commissioners to appraise the value of the land to be taken and the benefits to the abutting land shall make a report, upon the confirmation of which "the Mayor, Aldermen and Commonalty of the City of New York shall become seized *in fee* of all said lands" * * * (necessary for the street, &c.).

"In trust nevertheless that the same be appropriated and kept open for, or as part of the public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are and of right ought to be."

The plaintiff built its bank building at the corner of Twenty-third street and Third avenue in 1874. In 1878 the Railroad Company built its depot or station in

the middle of Third avenue opposite the property of the bank, and constructed on and along Third avenue a railroad track elevated some fifteen feet above the surface of the street supported by iron columns. The station has stairs thereto and therefrom at the intersection of Twenty-third street and Third avenue. The tracks are fifteen feet wide.

Upon the second trial the learned Justice ruled that the elevated railroad company was not liable for any damages on account of any inconvenience occasioned by the noise or the running of the trains, or smoke or cinders, or steam or gas, or any of the things connected with the running of the trains, and that the jury were to confine themselves entirely to the structure itself in determining the amount of any damages to be awarded to the bank (see page 46 of Record).

No question was made upon the trial of the possession by the elevated railroad company of full legislative and municipal authority to maintain its road and structures and run its trains at this point. The claim of the bank was that it was entitled to have the street kept open in front of its premises, and that so far as the characteristic benefits to owners abutting upon such a street, to wit, rights to light, air and access, appurtenant to its premises, had been impaired by the obstruction in the street occasioned by the elevated railroad structures, it was entitled to be compensated in damages.

The Court left it to the jury to say: first, whether the street has ceased to be an open street by reason of the erection of this structure by the defendants; and, secondly, whether such erection has damaged the plaintiff.

At the close of all the testimony on the trial, counsel for the original defendant moved that the jury be directed to render a verdict for the defendant, because no facts had been shown sufficient to constitute a cause of action against the defendant.

The Court denied this motion. To such denial counsel for the defendant duly excepted.

Counsel for defendant also moved that the jury be directed to render a verdict for the plaintiff for nominal damages only; and excepted to the denial of that motion (pages 43 and 44 of Record).

These motions were based upon the claim that the case as a whole showed clearly that the street had not ceased to be an open street by reason of the erection of the structure of the defendant; and that no material or substantial obstruction to travel was occasioned by the presence of these structures in the street, and that there was no question therefore to be submitted to the jury in that regard.

In his charge the learned Judge authorized the jury to find damages for the bank up to the time of the trial of the case. It was claimed that no damages could be allowed for any later period than the time of the bringing of the action; and an exception was duly taken by counsel for the defendant to the ruling and instructions to allow the original plaintiff such damages as it had sustained by reason of the erection up to the time of the trial (see page 47 of Record).

Counsel for the original defendant also excepted to the charge by which the jury were permitted to allow the original plaintiff for other discomforts and inconveniences than being compelled to use gas in so much of the bank building as is used by the bank itself for banking purposes.

It was also objected that the bank could not recover any damages for loss of rents or rental value, and that the recovery should be for the permanent injury to the plaintiff's property by the railroad's interference with the easements of light and air.

Proper exceptions were taken to the refusals of the Court as to these matters (page 47 of Record).

At the close of the case of the original plaintiff, a

verdict for the defendant was asked to be directed, and an exception was taken.

The Court was also asked to instruct the jury to return a verdict for nominal damages.

The grounds of these motions were that there was no evidence in the case of any injury occasioned by the structure of the defendants, apart from the injury to the light and air of the premises occasioned by the trains, which the Court had ruled could not be taken into consideration as a basis for damages (see pp. 32 and 33 of the Record).

The Railroad Company then desired to go into the question whether the value of the property on the avenue had not increased since the coming of the railroad structure. The object of this inquiry was to show that the bank had in fact suffered no injury from the erection of the Railroad Company in Third avenue. The claim of the plaintiff in error on this subject is that while benefits cannot be offset against the value of land which is taken for railroad purposes, yet that here the inquiry is what consequential damages have been sustained by the owner of property, none of whose land has been taken for railroad purposes, but whose rights in the street have been interfered with.

The Court refused the plaintiff in error an opportunity to show what the facts were in this regard. With this in view counsel for plaintiff in error asked the question, whether the value of this property, at the corner of Twenty-third street and Third avenue had increased since the coming of the railroad structure.

Counsel for plaintiff objected to the question. The Court sustained the objection and counsel for defendant duly excepted.

If the damage were to be measured by the depreciation in value, this line of inquiry was vital, if the damage were to be measured by the loss of rents or enjoyment and use for a period, the fact that the premises had increased in value would tend to contradict some of

the evidence as to loss up to the time of trial (page 43 of Record).

First Point.

REGARDING THIS AS AN ACTION UPON THE CASE FOR A CONTINUING INTERFERENCE WITH CERTAIN EASEMENTS, APPURTENANT TO THE PREMISES OF THE DEFENDANT IN ERROR, IT WAS ERROR FOR THE COURT TO ADMIT EVIDENCE AND PERMIT A RECOVERY OF DAMAGE TO THE DEFENDANT IN ERROR, ACCRUING AFTER THE COMMENCEMENT OF THE ACTION.

The action must be regarded as brought upon one or the other of two distinct and conflicting theories ; either as an action to recover damages consisting of a permanent depreciation in the value of the premises, due to the destruction, once for all time, of certain rights or attributes, of value to the premises in question, due to the erection in the street of a structure, confessedly permanent ; or, on the other hand, as an action on the case to recover, for a continuing interference with such rights, damages thereby accruing from day to day, up to the commencement of the action, by the continued maintenance of a structure, which because temporary, had not destroyed the rights.

The complaint, at fol. 9, avers the existence of two species of damages, to wit, damage to the permanent use and value of the building and premises caused by locating the station and depot in proximity to plaintiff's premises, and damage to the use and enjoyment of the premises and injury to their rental value. The Court, however, has allowed the case to proceed upon the theory that the action is one upon the case for a continuing trespass, and charged the jury (at fol. 109) to

allow the plaintiff damages for injury to the impairment of the building from the time the structure was put up *to the present time.* At fol. 113 the counsel for the original defendant excepted to the ruling and instruction contained in the charge that the jury might allow the plaintiff such damages as it had sustained by reason of the erection up to the present time. The trial Judge, at fol. 39, states in his opinion that the defendant excepted to this part of the charge, and that the correctness of it is a question in the case. We take it to be the general rule that damages cannot be recovered, in a case for a continuing trespass, beyond the commencement of the suit. In contemplation of law the trespass is a fresh offense each day of its continuance, and each trespass constitutes a fresh cause of action. In cases of continuing trespass or nuisance the Court disregards, to be sure, the immaterial interval, and may permit one action to be brought founded upon a cause of action embracing a considerable interval of time and numbers of trespasses. But the plaintiff can bring suit each day upon the preceding day's trespass, and in no one suit is it possible to make compensation for all possible trespasses in the future. From this it follows that the plaintiff is restricted in his recovery in any one suit to the amount of damage suffered by him up to the time of beginning that suit.

This doctrine is supported by the text writers on the subject, English and American.

Mayne on Damages, Edition of 1872, p. 63 :

" In cases of nuisance and continued trespass upon land, as each instant the nuisance or trespass is continued is a fresh ground of action, it is clear the jury cannot give damages beyond the commencement of the existing suit."

1 Sutherland on Damages, p. 198 :

" A continuous * * * wrong is not an entirety.

It is at any time severable for the purposes of redress in damages for the injury already suffered. * * * There is a legal obligation to discontinue a trespass or to remove a nuisance. * * * When an action is brought, the injury at that time is segregated and recovery is confined to such damages as result from the breach or wrong continued to the commencement of the action. The law will not presume a continuance of the wrong, nor allow a license to continue a wrong or a transfer of title to result from the recovery of damages for prospective misconduct."

Sedgwick on the Measure of Damages, p. 144 :

"Every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie. * * * And, therefore, says BLACKSTONE, speaking of the same subject, 'very exemplary damages will probably be given if, after one verdict against him, the defendant has the hardiness to continue it.' On this ground, that suit can be brought *toties quoties*, it has been decided that in an action on the case for a nuisance damages sustained subsequent to the bringing of the action are not recoverable."

Field on Damages, p. 602 :

" In an action for a nuisance the measure of damages embraces all injuries done to the plaintiff by reason of the nuisance to the commencement of the suit, but not prospective or permanent injury."

Sedgwick, Leading Cases on Damages, page 658, Note :

" The measure of damages for a continuing nuisance or trespass, for which successive actions may be maintained, is the loss sustained at the time of bringing the suit, and for which a recovery has not been had, and not the diminution in the value of the estate."

This is also the doctrine of the Federal Courts.

Wightman vs. City of Providence, 1 Clifford, 524.

Bradley vs. The Washington, Alexandria and Georgetown Steam Packet Co., 9 Peters, 107.

Baltimore & Potomac R. R. Co. vs. Fifth Baptist Church, 108 U. S., at p. 322.

Wightman vs. City of Providence, just cited, was an action of trespass on the case to recover damages for personal injuries received in consequence of a defect in a highway in the City of Providence, R. I. Mr. Justice NATHAN CLIFFORD, in delivering the opinion of the Court said :

" Damages for bodily pain, injury and suffering received from physical injury and connected with loss of time or diminished ability to labor as the direct consequence of the injury, are not exemplary or punitory in their character in any proper sense of those terms, but are the legitimate ground of damages in all cases of this description ; and yet it is difficult, if not impossible, to prescribe any very definite rule by which the jury are to be governed in estimating the amount to be allowed for that cause.

Successive actions may sometimes be brought for a continued wrong, as in the case of a continued trespass on land, and in all such cases the damages are limited to those sustained by the plaintiff at the commencement of the action on trial."

Bradley vs The Washington, &c., Steam Packet Co., *supra*, was an action brought to recover for the hire of a steamboat. On the trial of the case at Circuit the jury were directed to find damages down to the 6th February, 1832, whereas the suit was brought on the 2d December, 1831.

The Supreme Court held, Mr. Chief-Justice MARSHALL writing the opinion, that this instruction to the jury was erroneous because under it damages were to be

given to a time long posterior to the institution of the action.

This is also the doctrine of the Courts of the State of New York.

Uline vs. New York Central and Hudson River Railroad Company, 4th Eastern Rep., p. 30.
Blunt vs. McCormack, 3 Denio, 283.
Bickwell vs. Gusward, 29 Barb., 291.
Fettreck vs. Leamy, 9 Bos., 524.
Whitman vs. Bischoff, 5 Hun, 176.
Plate vs. New York Central Railroad Co., 37 N. Y., pp. 475, 476.
Beach vs. Crain, 2 N. Y., 92.
Mahon vs. N. Y. Central R. R. Co., 24 N. Y., 685.
Greene vs. N. Y. C. & H. R. R. Co., 65 How. Pr., 154.
Hussnel vs. Brooklyn City R. Co., 114 N. Y., 433.

As to the law of the State of New York it should be sufficient to cite the leading case of Uline vs. New York Central & H. R. R. R. Co., *supra*, decided by the Court of Appeals January 19, 1886.

This case is as follows :

Colonie street runs at right angles with, and crosses, Broadway in the City of Albany, and the New York Central Railroad crosses the two streets diagonally at the place of their intersection, and it crossed there for at least forty years before the trial of the action. The plaintiff owned three houses and lots contiguous to each other on the northerly side of Colonie street, easterly of Broadway and of the railroad. Two of the lots extend only to the northerly side of Colonie street, while one of them extends to the centre of the street. About the year 1874 two additional tracks were laid upon the defendant's road where it crossed the two streets, one of which tracks was upon the easterly side thereof, and the road-bed was raised at its intersection with Broad-

way from two and a half to three feet. Neither of the tracks nor any part of the roadbed was upon the plaintiff's land, nor did she receive any damages from them, but to accommodate the grade of Colonie street to the grade of the railroad it became necessary to raise the street and sidewalk thereof, and the consequence was that the street and sidewalk in front of the plaintiff's lots were elevated about one foot, and the damage complained of was caused by this elevation, the plaintiff alleging that the defendant so tore up the pavement, raised the street and shaped the street and gutters as to pour the water therefrom down over the sidewalk into the basements of her houses, by means of which her premises had been flooded with water, &c.

After discussing other questions the Court say (page 35), per EARL, J.: "The plaintiff claims that the interference by the defendants with the street was unlawful and a nuisance, and that therefore the plaintiff was entitled to recover damages caused thereby; and if he is right in his contention that this embarkment placed in the street by the defendant was unlawful, and, therefore, a nuisance, then the plaintiff was entitled to recover damages. The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and thoroughly settled. There never has been in this State before this case the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff, in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the Courts; and it is the prevailing doctrine elsewhere.

The doctrine of the Courts of England and of the other States of the Union is the same.

See in addition to Uline vs. N. Y. Central, &c., *supra.*
Battishill, vs. Reed, 18 C. B., 696.
S. C., Sedgwick Sel., Cases on Dam., 658.
Robinson vs. Bland, 2 Bur., 1077.
Cole vs. Sprowl, 85 Me., 161.
Delaware and Raritan Canal Co. vs. Wright, 1 Zab., 469.
Powers vs. Ware, 4 Pickering, 106.
Pierce vs. Woodward, 4 Pickering, 206.
Duncan vs. Markley, 1 Harp. (So. Car.), 179.

In *Robinson vs. Bland, supra*, it was said by Lord MANSFIELD: "When a new action may be brought and satisfaction obtained thereupon for any duties or demands which may have arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment upon the former action. * * * In trespass and tort new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."

In *Cole vs. Sprowl, supra*, it was said by the Supreme Court of Maine that "for obstructing plaintiff's right of way or for unlawfully excluding the light from his doors and windows the damages are to be assessed, not to the time of the trial but to the date of the suit.

In *Powers vs. Ware, supra*, the Supreme Judicial Court of Massachusetts said: "The cases are decisive that by the common law the plaintiffs can recover only to the time of bringing the action, unless there be a distinction in this respect between covenant and tort. It seems to us, however, that no such distinction can exist."

In *Pierce vs. Woodward, supra*, the Supreme Court of Massachusetts said: "A new trial must be granted because the jury in assessing damages did not confine

themselves to the period before the action was commenced."

In *Duncan vs. Markley, supra*, the action was on the case for damages occasioned by a nuisance. The trial Judge charged the jury to admit damages, "not only for the injuries done prior to the commencement of the action, but for such as had been sustained since." A verdict was accordingly rendered for the plaintiff. On appeal judgment was set aside, the Supreme Court of South Carolina holding "in an action on the case, for damages occasioned by a nuisance, damages sustained since the beginning of the action are not recoverable. * * * There is no necessary, certain connection between the injuries sustained before and after the commencement of the action. It does not follow, because a special injury has been sustained at one period of time, that another is to follow at any interval, or at all. If, therefore, the plaintiff be permitted to give evidence of an injury sustained subsequently to the bringing of the action, the defendant may be surprised, for he may not know of the injury sustained, nor be prepared to sustain himself."

It has thus been shown that the rule here contended for was the rule of the common law, as laid down by so eminent an authority as Lord Mansfield, and continues to be the rule of the English Courts, that it is the rule of the Federal Courts, is adopted by the Courts of all the States, notably by New York, and is supported by all the approved text writers on the subject.

This action was begun March 5, 1880, (see Marshal's return of service of summons and complaint, page 5 of Record), while the jury were allowed to award damages down to the time of trial in June, 1886.

The evidence believed by the jury seems to show an injury of about $1,000 a year. The verdict was for $5,000.

It will thus be seen that all, or nearly all, the damages awarded by the jury were for the period since the beginning of the action, all of which should have been excluded under the rule so long and well settled, as above set forth.

The verdict is for a lump sum without specifying how it is made up. The Court, therefore, cannot divide the damages awarded for injury sustained before from that sustained after action brought. It will therefore be necessary to set aside the whole verdict.

It is submitted that error so substantial and so vitally affecting the whole verdict offers the soundest reason for reversing the judgment.

This action then being regarded by the Court as an action to recover damages for a continuing trespass, or nuisance, for a continuing interference with certain easements, the rule of damage should have been made to conform to the rule of damage applicable to such a case, and the instructions to the jury should have been such instructions as would be proper in a case for a continuing trespass.

It does not appear to be a satisfactory answer to our proposition, to say that, as the testimony was let in, it was no error to permit a recovery of damages up to the time of trial, because this might have been brought about by the service of a supplemental complaint, containing allegations of the continued infliction of damage up to a time later than the commencement of the action. This, however, is the ground taken in the opinion of the trial Judge (fols. 39 and 40 of Record). No application for leave to serve a supplemental complaint was at any time made to the Court. No amendment of the complaint has in fact been asked or made, and no motion has been made or granted at any stage of the case to change or supplement the complaint, so as to bring the allegations of damage down to the time of trial. It would have been difficult to have prevented

the Bank from showing the whole course of its rentals, even as evidence of the matters which were properly in issue.

This does not appear to be an instance of a variance between the allegations of the pleading and the proof introduced, and Section 589 of our Code of Procedure seems, therefore, to have no application. In case of the commencement of another action to recover damages for a continuance of the trespass from the time of the commencement of this action to some later date, the judgment roll in this action, which will consist of the pleadings and judgment, will constitute no bar to a recovery again by the bank of the damages inflicted after the commencement of the action at bar, because the record of the judgment will show that the suit embraces no such period of time, and the opinion of the Judge and his charge to the jury, wherein it appears that he has erroneously allowed, as we claim, damages to be recovered since the commencement of the action, will form no part of the judgment roll.

A perusal of Section 544 of our Code of Civil Procedure, referred to by the trial Judge at folio 39, does not appear to show that the authority there given to the Court, to permit the making of a supplemental pleading alleging material facts which have occurred after the former pleading, or of which the pleader was ignorant when it was made, is intended to confer power upon the presiding Judge *at a trial* to then authorize such a supplemental pleading. Nor does it seem beyond question that such section was intended to authorize the insertion of allegations of damage occurring after the commencement of an action, in a case where the action is one which, from its very nature, is intended to provide redress for injury suffered up to the time of its commencement, because the damages sustained since the commencement of the action at bar, if any, will be the foundation of an independent, distinct and new cause of action, which may be properly enforced

in a new suit. The section under consideration was probably not intended to authorize a plaintiff to insert upon the trial *a new cause of action* in his complaint which had accrued to him since the commencement of the action being then prosecuted.

The section of our Code which authorizes an amendment of pleadings upon the trial has been construed by our courts as not authorizing an amendment of a complaint in such manner as to insert a new cause of action.

But the judgment roll in this case does not embrace any other period of time than up to the commencement of the action, and only by the opinion and charge to the jury can it be shown that the jury, as matter of fact, were allowed to take into consideration damages occurring since the commencement of the suit.

Second Point.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE DAMAGES WHICH THEY SHOULD ASSESS MUST BE THE PERMANENT INJURY, IF ANY, TO THE PLAINTIFF'S PREMISES BY REASON OF THE DEFENDANT'S INTERFERENCE WITH THE EASEMENTS APPURTENANT TO THE SAME.

At folio 114, the Court was requested by the Railroad Company to instruct the jury so to measure the amount of their verdict, and to the Court's refusal an exception is there noted.

Upon the first trial, had before Judge SHIPMAN, the recovery, as is intimated in his opinion, was for an alleged depreciation in the value of the premises due to the construction of this permanent station and railway, which destroyed the rights to light, air and access ap-

purtenant to the premises. The complaint, at paragraph 6, alleges the erection of a large and permanent station or depot, with appurtenances; and further alleges, at paragraph 8, that the permanent use and value of the building and premises have been seriously injured and impaired. There are also other allegations as to the loss of rents and profits and of interference with the enjoyment of the premises. It is also to be observed that the land in the street in front of the bank's premises does not belong to the bank, but to the City of New York, and the Court charges (at folio 106) that as the streets were laid out and opened under certain proceedings authorized by statute, the city owned the land in the avenue and street in trust, that the same be appropriated and left open for and as part of the public street forever, as other streets are to be left open. All the rights of the plaintiff in the street, which have been interfered with by the railroad company arise out of a right to enforce this trust, which is the trust described in the act under which such streets have been opened and acquired by the City. The bank itself does not own any land in the street. But this trust has been construed by the Courts in New York to be more than a simple designation of the trust, upon which the municipal corporation shall hold the land. It has also been regarded as a covenant between the abutter and the City, running with the land, by reason of which the abutter is entitled to easements over the land in the street, consisting of a right to light, air and access, which are the characteristic benefits to the abutter of having the street kept open forever (see Story vs. N. Y. El. R. R. Co., 90 N. Y., 120).

These rights to light, air and access are valuable attributes to the premises. Any continuous, though temporary interference might give rise to an action on the case for the recovery of the damages inflicted during the continuance of such temporary interference, to be measured by loss of rent or otherwise, for a specific

period. But if, as is alleged in the complaint, the railroad structure is a *permanent one*, these rights in the street were permanently cut off and destroyed at the time of the erection of such structures, and, in case of a permanent destruction of these rights, the measure of damage should be the depreciation in the value of the premises occasioned by the loss of these valuable rights or attributes. The measurement of the damage then must depend upon whether or not the rights were temporarily interfered with or were permanently destroyed. Assuming that the bank might have regarded these structures in bringing its action as either permanent or temporary, we claim that the bank, by its complaint, has chosen to bring its action upon the theory of a destruction by a permanent erection of the rights in question. Not only is there the allegation in express terms that the station or depot and appurtenances are permanent, but the further allegation at folio 9 that the permanent use and value of the building and premises have been seriously injured and impaired, and that the market value of the premises have been and will be in the future greatly reduced. If the structures were temporary this allegation could not be true, for, if the structure were temporary it could, at most, constitute a temporary impairment of the use and enjoyment of the premises, and could not cause a permanent depreciation in their value.

The law recognizes the existence of such a cause of action as is set forth in this complaint. There is recognized by law such a claim as a claim for permanent depreciation in the value of real estate, due to the destruction of a right appurtenant to the same, as will appear by the following English and American cases :

In 1854 the case of Nickiln vs. Williams was decided and is reported in Exchequer Rep., Vol. X. (H. and G.), p. 259. The plaintiff owned certain lands and houses, and contiguous were certain other lands. The plaintiff was entitled to support for his land and houses from

this adjoining land. The defendant negligently operated a coal mine in this adjoining land, and by reason of which the plaintiff's land and houses fell in. For this damage compensation was made by defendant and the claim settled. But by reason of the original negligent mining, the land subsequently again fell in. This action was brought for this second damage and the previous settlement was held to be a bar. The Court said: "Every injury to a right imports a damage. * * * We think this action is for an injury to a right; and consequently there was a complete cause of action, when the wrong was done, and not a new cause of action, when damage was sustained by reason of the original wrong. When so much of the land, coal or substratum was taken away as to deprive the plaintiff's land and house, &c., of the support to which the plaintiffs were entitled a cause of action accrued, though no actual damage occurred by the sinking of the land. * * * For this wrong the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric, and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive, with their own consent, a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong."

In 1858, the case of Bonomi vs. Backhouse was decided. 1 E. B. & E., Queen's Bench, 622.

The plaintiff owned land entitled to the support of the underground mines and minerals in the adjoining land. The defendant negligently worked the mines in the adjoining land, left no supports, &c,, and in consequence the plaintiff's land fell in. The Statute of Limitations was, however, pleaded by defendant, because the mining was all done more than six years before. But it appeared that the mining was done at a distance,

and the effect gradually crept along, and the falling in and damage occurred within six years.

The Queen's Bench decided that the action was barred, and give judgment for defendant.

The judges thought that the cause of action was the negligent digging, which was a disturbance of the plaintiff in the enjoyment of his property, although the damage did not occur until later, and the measure of damages was thought to be the depreciation in fee value.

WIGHTMAN, J., says at p. 338: "With respect to the damages, I am of opinion that as the action is founded upon the consequential damage, the plaintiffs can only recover in this action to the extent of the damage they have actually sustained, which may include not merely what they are obliged to pay out in actual repair, but the diminution in the value of the premises by reason of the damage."

COLERIDGE, J., 640–641, concluded that injury to a right gives a cause of action and that the accruing of damage is not part of the cause of action any more than it is in trespass. But he says that the action for injury to a right must be satisfied by one recovery for all damage, not being like a continuing nuisance.

The Court of Queens Bench decided that the cause of action arose when the right to support was injured and not when the damage occurred, and hence, that the plea of the Statute of Limitations was good.

This was reversed in the Exchequer Chamber, 1 El., B. & E., p. 646, and it was held that the injury to the right to support, together with the accruing of damage, constituted the cause of action, and hence the Statute of Limitations began to run from the time of the first occurring of damage after the injury to the right. This was affirmed by the House of Lords, H. of L. Cases, Vol. 9, 503. But all agreed that the damages must be recovered once for all and in one action, whether the right to support were the right of support of the soil, which was not an easement but simply a right to use

and enjoy the land, or the right to support were for the buildings, which was an easement if the buildings were ancient structures.

MILLS, J., in the Exchequer Chamber, says, p. 654: "The right to support of land and the right to support of buildings stand upon different footing as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river or of air * * * whilst the latter must be founded upon prescription or grant express or implied; but the character of the rights when acquired is in each case the same." At p. 658, he clearly states his opinion, "that in a case like Nicklin vs. Williams, 10 Exchq., 259, no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment and accord;" and at p. 658, he says in the "present case we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred."

The House of Lords, 9 H. of L. Cases, 503 (1861), held that the cause of action arose when the damage arising from the mining occurred, and the statute began to run from that time. But they thought that only one recovery could be had for all damage done as the Lord Chancellor says, p. 512, "With regard to the case of Nicklin vs. Williams the decision of that case is, I think, beyond all question. Some of the dicta which occur in that case * * * are certainly not necessary for the decision that was there pronounced."

In 1873 the case of Lamb vs. Walker was decided. See L. R., 3 Q. B. Div., 389. Defendant by mining on his own land deprived the plaintiff's land and buildings of the right to lateral support which was appurtenant to them.

The case was tried by a Referee, who found a certain amount as the injury to plaintiff's fee, *i. e.*, a certain amount for existing damage and a certain amount for future damage.

The question before the Court was whether plaintiff should have judgment for all the damage present and future or only damages up to the present, and another action for future damages.

Some judges dissented, but the Court gave plaintiff judgment for the whole amount.

The claim was for damage to plaintiff's reversionary interest.

MANISTY, J., p. 393, says: "It was contended (on defendant's behalf) that inasmuch as his mining operations in his own land were not *per se* wrongful acts, the plaintiff's only cause of action was the 'consequential damage' done to the plaintiff's property up to the time of the commencement of the action.

"It was contended on the part of the plaintiff that, although he had no cause of action against the defendant until his land and buildings were injured, nevertheless, as soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf, that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct."

His opinion proceeds upon the theory that the damage being occasioned by the destruction of a right, there was only one cause of action, and all damage must be recovered in one suit.

The same Judge illustrates by saying, pp. 394 and 395: "Take for instance the case of the wrongful obstruction of light by means of the erection of a new

building lawful in itself. In that case it might be said the plaintiff ought only to be allowed to recover the damage sustained up to the time of the commencement of his action, because, possibly the obstruction may be removed, and, therefore, it would be unjust to permit the plaintiff to recover prospective damages, unless and until it is actually incurred. If that principle were adopted, one consequence would be that the Statute of Limitations would cease to be operative. A plaintiff might lie by until after the expiration of six years, without bringing any action, and then not only may an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing."

MILLER, J., p. 397: "The act done by the defendant so long as he confined his excavations to his own property, was a lawful exercise of his right; but as soon as he in the otherwise lawful exercise of his own right, excavated on his own land to an extent and in a manner which caused damage to the plaintiff's property, then the act *ipso facto* became tortious, and the plaintiff became entitled to maintain his action."

Next comes the case of Mitchell vs. Darley & Main Coal Co., reported in L. R., 14 Q. B. Div., 125, decided in 1885, which to a certain extent, overrules the case of Lamb vs. Walker.

The plaintiff owned certain land, and the defendants worked a seam of coal lying under and near the plaintiff's land. This excavation took place in 1867, 1868. A subsidence took place, owing to these excavations in 1868, and continued until 1871. There then stood on plaintiff's land six cottages which were injured by the subsidence, and were repaired by defendant.

In 1878, those cottages were pulled down and three new ones built in place of them. In 1882, a second subsidence took place due to the same excavations of 1867, 1868, producing injury to the three new cottages,

and this action was brought to recover the damages inflicted to these new houses by the second subsidence of 1882. The opinion, at p. 128, reading: "It is not alleged by the plaintiff that any further damage was done to any property of his by the actual subsidence which then took place, that is, soon after 1868." The Statute of Limitations was pleaded by defendant.

All these previous cases were carefully discussed, and the conclusion finally reached that, unlike the case of a trespass upon land in which the cause of action is complete without damage, in the case of an interference with a right, such interference and resulting damage must both concur to produce a cause of action.

But that an entirely separate, disconnected and independent occurrence of damage, such as that produced by a second independent subsidence, even though caused by the original interference with the right, is not additional damage connected with the first cause or action. The Master of the Rolls says, p. 129, "What they (defendants) did in excavating was perfectly lawful, if they had taken care that in so using their property they didn't hurt him; but in 1868, or immediately afterwards, they did something which did give him a cause of action, that is, they caused his land to subside, and this subsidence caused by them was his cause of action; they caused that subsidence by mining and not by propping so as to prevent the plaintiff's land from subsiding afterwards. That cause of action was settled between them when they repaired his houses; but now they have done him a new and wholly independent injury; they have caused his land to subside again. *It is true that in this case it is at the same spot as before, but it might have been a hundred yards off; it is a new subsidence.*

According to BOWEN, J., the right destroyed in that case was not a definite easement, but a general right to the enjoyment of the property. Hence he regarded the taking away of the lateral support as not constituting a

cause of action alone, until it resulted in a disturbance of enjoyment. In the case of the destruction of a definite easement, the arguments used in the case of Mitchell vs. D. M. Co., would apply still more strongly in favor of a total recovery once for all in case of the destruction of such easement accompanied by damage, there being nothing corresponding to a second separable and independent subsidence.

This last case, therefore, overruling some conclusions in Lamb vs. Walker, we regard as still leaving unquestioned the only element to which we call attention. These cases distinctly hold that where a right appurtenant to land has been destroyed and damage has resulted, that there is one cause of action, and the consequent damage inflicted relates to that cause of action and must be recovered in a single action, although if a second separable and independent damage again occurs, such as in a second subsidence of the earth, that damage is not additional to the first cause of action, but, in connection with the original destruction of the right, is a second cause of action. This proposition holds true whether the right destroyed is so general as to be merely a part of the right to the owner's enjoyment of the property, or an easement appurtenant to the land.

But the Court, in overruling the case of Lamb vs. Walker, and discussing this very question of recovery once for all for each cause of action, says, p. 133, Mitchell case (*supra*), "Where an excavation has been made and a subsidence taken place, it may be true that *for all the effects, both existing and prospective*, of that subsidence, the person injured ought *to sue at once*, and I incline to think he ought. It is not necessary to determine that in this case, but I am strongly inclined to think he ought. But what is to be done as to a new subsidence?"

The same Judge says, p. 134: "Therefore, whilst I am strongly of opinion, although it is not necessary to

decide it in this case, *that in respect of the same subsidence the jury ought to take into account, not only the actually existing damages caused by the subsidence, but also the prospective damages which may be the result of that subsidence*, yet I think that where there is a new and further subsidence, that is the new cause of action."

These cases seem to sustain the correctness of the proposition for which we contend.

The destruction of a right appurtenant to land, joined with the occurrence of damages, has been regarded as constituting a cause of action in the enforcement of which the whole damage once for all must be recovered in a single action.

There is nothing in the case at bar corresponding to the second separable, distinct and independent subsident mentioned in the English case, which only by chance happened again to occur at the same spot where the previous damage had been inflicted. So far as the principle of the case is concerned, they might be regarded as cases where the second subsidence occurred in some other part of the premises.

Thus in Van Zant vs. The Mayor, 8 Bosw. (N. Y.), 375, a right to wharfage was appurtenant to and formed part of the property right in a parcel of land, and descended with that land to the heirs of the owner. This right to wharfage was destoyed by a filling in of the slip many years before the land descended to the present plaintiffs and while in the possession of their ancestor.

This filling in and destruction of the right to wharfage was decided to be the foundation for an action of damages by the owner at the time, and the injury was held to be complete and fully and finally consummated when the filling took place. This was held to be a chose in action vested in the then owner, and, p. 388, " *the measure of damages was the whole depreciation in*

the value of the wharf caused thereby," *i. e.*, by the destruction of the right to wharfage.

Page 388, also, " But I think it clear that if an action had been brought by (the ancestor) in his lifetime, for the damages caused by the injury to his wharf, and the breach of the defendant's covenant, that recovery would have embraced entire damages for the whole injury, and he could not have brought successive actions year after year for the annual value of the wharf as damages."

The opinion proceeds to discuss the difference between a case of the destruction of a right appurtenant to land and relating to the enjoyment of the land, and the case of an actual trespass upon land where the damages must be recovered from time to time as it accrues and as actions are brought.

This cases is cited with approval in Langdon vs. The Mayor, 93 N. Y., 129. That was an equity action brought to restrain the filling in of a slip, whereby wharfage rights *would be* destroyed. At the time the action was brought only slight filling had taken place and the wharfage rights apparently, as yet, were not affected. But the complaint asked for an injunction, and, incidentally, judgment for the damage already done. Judgment was given for defendant at the Special Term, and, as stated in the opinion of the Court of Appeals, which affirmed a judgment reversing the Special Term, pending the appeals, the complete filling in occurred; a dock was built outside the plaintiff's wharf, and plaintiff's old bulkhead was entirely destroyed as a wharf (p. 143). The Court of Appeals rendered judgment absolute for plaintiff, and under the circumstances the practical intention must have been that the City should pay the damage occasioned by the plaintiff's wharf having been deprived of the wharfage rights—that is, the depreciation so caused. At least that was the interpretation placed upon it by the City, for as

matter of fact the City paid a bulk sum as the depreciation in value of the wharf.

So in Baltimore and Pat. Co. vs. Reavy, 42 Maryland, 117.

This was an action not of trespass but "on the case" to recover damage due to the destruction of a right appurtenant to land.

The plaintiff's house was situated near a street through which a tunnel was driven by the defendant's railroad. Plaintiff's house was regarded as having a right to lateral support. This was destroyed partially by the excavation of the tunnel and damage inflicted.

Upon the question of liability this case is probably not in accordance with the law of this State, because there was no property right, but only a right to general enjoyment disturbed (Radcliff's Exrs. vs. The Mayor); but we mention the case only so far as it relates to the measurement of the damage occasioned by interference with the right to support.

The plaintiff had a leasehold and the measure of damages was held to be the amount of damage done to his particular interest in the premises.

In Town of Troy vs. Cheshire Railroad, 23 N. H., 83, the highway was permanently obstructed by the construction of the railroad. The opinion states (p. 92), that the town did not own the land, but that the public possessed an easement in gross for a highway; that although this easement or highway was for the benefit of the whole public and was not owned by the town, yet the town was bound to keep it in repair, and for this reason had a qualified property in the easement or highway, bridges, etc., quite similar to the ownership of a turnpike or toll company.

The Court (pp. 102–103) regarded the destruction of the highway or easement by the erection of the railroad and a railroad bridge, to be permanent, at least so far as the property or interest of the town in such highway was concerned. The Court declared (p. 101) that the

recovery in that action was, of course, a bar to any future action for the cause alleged in that complaint, and also held that nothing could be recovered unless it was alleged in the complaint.

The problem was to determine what was that cause of action, and it was held that the destruction of the easement or highway, entitled the town to recover the total damage thereby occasioned once for all, and the measure was practically the worth to the town of that highway, so far as its qualified property in the same extended, *i. e.*, a property or interest founded upon a duty to build another and to keep in repair, etc.

Fowle vs. New Haven R. Co., 107 Mass., 352.

A case of destruction of a right to support, or of the right to have a stream remain in its natural channel, caused by the turning of the current of the stream by a permanent structure. This resulted in a gradual washing away of plaintiff's land.

A former recovery for this injury to a right, resulting in damage, was held to be a bar to present action.

Regarded as an action of trespass upon land, by throwing water upon plaintiff's land, as in the Uline case (101 N. Y., 98), it would be untenable, but it was clearly regarded as a destruction of a right, and from the gradual washing away in the same place we can discern the marked difference between this Massachusetts case and the second separate and independent subsidence of the English cases, which only by chance happened to occur in the same locality as the former subsidence, as one of the English Judges observes.

In Chicago vs. Stein, 75 Ill., 41, we have an instance of a recovery once for all, or a recovery of the depreciation of value of the property because of a permanent railroad bridge on a stream which destroyed in part the riparian owner's right to wharfage. The case is founded

upon the same principle as that of Van Zandt vs. The Mayor, where the right was destroyed by filling in about the pier.

Thus, as a contrast with the cases of a destruction of an easement appurtenant to land, we have cases of an actual trespass upon land.

The case of Whitehouse vs. Fellows, 10 C. B. (N. S.), 766, where the trustees of a turnpike road constructed a drain in the highway in such a manner that in time of rain the property of plaintiff was overflowed, presents an instance of actual trespass upon land as distinguished from a destruction of a right appurtenant to land. The water being in fact deposited upon his land constituted trespass *q. c. f.* The damage was not the result of any interference or destruction of an easement, and as said by WILLIS, J., at p. 786, the plaintiff would recover separately each time a separate injury was suffered by him by reason of an overflow.

We claim that our views are in accordance with the decision of the N. Y. Court of Appeals in Uline vs. The N. Y. Central, 101 N. Y., 98. There the question arose in a clear action of a trespass upon land, as to whether the damages once for all measured by depreciation of fee value, could be recovered at all. There was no intimation of any easement attached to the premises over the street having been destroyed or taken, but the damage was due to water being forced upon plaintiff's land. This occurred upon a lot which did not extend into the street and was caused by the change of grade in the street made by defendant for the purposes of its embankment and railroad. The plaintiff owned no property in the street whatever. After the exhaustive analysis of the case contained in the opinion of the Court of Appeals, the proper solution seems simple.

The Court before whom the Uline case was tried appears to have thought that if the defendant's acts were negligent and unlawful they could not be pre-

sumed to be permanent, and hence only damages up to the time of action should be recovered. But that, if lawful, the injurious consequences might be assumed to be permanent, and the total damage recovered, *i. e.*, depreciation in fee value. But the plaintiff, having no fee or easement or property in the street which was taken, consequential damages due to a change of grade by authority of the city would create no liability whatever. The lawfulness or the contrary of defendant's acts appears to have depended upon whether defendant was authorized by the city to change the grade. But this very fact upon which the whole question of liability necessarily depended, appears not to have been the subject of definite proof by either party. The plaintiff appears to have claimed at last that the facts of defendant were unlawful, the contrary having been assumed upon the trial without proof, and hence that as defendant's acts constituted a nuisance, and the water was caused to flow upon plaintiff's land, damage once for all could be recovered in an action at law. But the Court of Appeals points out clearly that if defendant's acts were lawful, the consequence would be, not that they would be presumably permanent, but would create no liability; whereas, if the acts were unlawful, the throwing of water upon the land would be actual trespass each time it occurred, and that damages sustained up to the time of the commencement of the action could, of course, alone be recovered. That case presented an instance of a trespass upon land, and not a cause of action for damages to be recovered in an action of "trespass on the case," for destruction of an easement or property right in the street appurtenant to the land. It was a case of precisely the nature of one with which we are endeavoring to contrast the case at bar.

Most of the cases cited in the opinion of EARLE, J., were cases of trespass *quare clausum fregit*, and the Court held that the damages must be estimated up to

the time of the commencement of the action, and that depreciation in the value could not be the amount of the recovery.

This is also clearly set forth in C. & O. Canal Co. vs. Hitchings, 65 Maine, 140, cited with approval in Uline vs. N. Y. Central (*supra*).

Of the same nature as the Uline case, that is trespass upon land, and in contrast with the present case, was the case of Baldwin vs. Calkins, 10 Wend., 169.

Defendants had by statute a right to build a dam. They were authorized to enter upon land upon paying compensation. A method of assessing the value of the land, and of ascertaining the damage occasioned by flowing land with water, were provided by the statute. A dam was built and continued for ten years. It broke and was rebuilt but made higher, and so continued for ten years more. The owner of the land below, which was overflowed because of the dam, made no claim and continued in ownership for several years, and then conveyed to plaintiff's ancestor.

It was held that, although every one has a right to the natural flow of a stream, that twenty years exclusive enjoyment of water in particular manner was conclusive evidence of a grant, this limitation being applied in analogy to the Statute of Limitations. For damage after that no action would lie. That, therefore, the plaintiff had lost his right to recover damages due to the original dam, but could recover damages occasioned by the extra height of the new dam. The rule of damage was not the difference in value of the land, but should be the value of the use of the land covered by the increased height of the water above that produced by the old dam for six years. The plaintiffs claimed to recover the total damage, upon the assumption that the dam would continue forever. The value, deducting the benefits, would be the rule for the asessment of value of lands taken, but not for estimating

the damage for flowing the lands, which in fact was a trespass.

Thus, in Mahon vs. N. Y. Central, 24 N. Y., 658, plaintiff's testator owned land abutting on a turnpike road. The Turnpike Company had acquired the land in front, but only for the purpose of a road. The defendant railroad, by authority of the Legislature, purchased the rights of the Turnpike Company, constructed a track along the turnpike and raised the grade. For injury so occasioned the testator brought an action. The railroad subsequently widened the embankment and another track was made. The first recovery was pleaded as a bar to the action at law for damages by the present plaintiff. The Court held that if the testator could have recovered all he was entitled to in the first action the first recovery would be a bar to the second suit. But the testator owned the fee of the land, and the Turnpike Company could not transfer that to the railroad, but it reverted to the owner when the turnpike was abandoned. Hence, that the defendant by operating its road upon plaintiff's land, without purchasing the land, was liable for damagess from time to time as they accrued.

The Court of Appeals stated in Lattimer vs. Livermore, 72 N. Y., 174, that it was possible under the circumstances of that case that an easement of light might be destroyed by the erection by the owner, or his tenant, of an extension of a house. At page 182 it is said: "If it had been shown that this erection was such as substantially to intercept the light, air and vision from and over the several lots on the north thereof, the plaintiff's easement would thereby have been extinguished forever; and if the erection was such as to have the same effect to the extent of nine feet, the easement to the width of nine feet would have been destroyed."

There are strong reasons for regarding this structure of the railroad company, built upon public land by leg-

islative authority with municipal consent as permanent, even *without the assent* of either party to that proposition.

This railroad company is organized under the General Railroad Act, but derives its power to build in New York streets from Chap. 606, Laws of 1875.

The fact of permanency may be demonstrated in many instances by evidence of surrounding circumstances, as for instance, where the labor of removal would be so disproportionate to any advantage to be derived, that no motive could exist for the performance of the work, as in the case of some mountains. In other cases the presumption of permanency will appear from the law of the nature of the thing under discussion.

It will be found that the structure and railroad in question belongs to the latter class, and is presumably permanent because of the law governing its nature and existence.

It cannot be said that the Legislature was devoid of power to devote streets opened under the Act of 1813, to the purposes of the railroad in question, even assuming it to be a non-street use. It is a public use and the acts of the Legislature are constitutional which authorize the road.

Matter of N. Y. El. R., 70 N. Y., 327.
Matter Gilbert El. R. Co., 70 N. Y., 361.

So far as the public permission or authority is concerned the Legislature had the power to grant it.

That body possesses the power to change one public use of property to another public use, and to relieve the city from the trust to hold the property for a particular public use.

Brooklyn Park Com. vs. Armstrong, 45 N. Y., 234.
Heyward vs. The Mayor, 7 N. Y., 314.

1. It is permanent in its nature, being erected in the

most substantial manner upon most extensive foundations, as permanent physically as almost any structure could be said to be.

2. It is not constructed and placed in the street for some temporary purpose, but the purpose is permanent.

3. But, more than all, it is permanent so far as plaintiff is concerned, for it is constructed upon the land the legal title to which is in the public, with the public consent, and by the authority of the Legislature.

The Act of 1875, Chapter 606, Section 32, contains provisions constituting any interference with the structure a criminal offense. Granting, therefore, that by the erection upon the public streets, under such legislative and municipal authority, the railroad has incidentally destroyed certain rights possessed by the abuttor to also use the street for certain purposes, yet the bank is not at liberty to remove or tear down such structure, and as to the bank it is permanent.

The bank cannot maintain ejectment, for the land upon which the railroad is built does not belong to the bank, although, if entitled to compensation, it may recover the same.

4. The New York Court of Appeals has decided in the Story Case, 90 N. Y., 122, that defendant Railroad Company may make use of the condemnation proceedings described in the general railroad laws of the Acts of 1872 and of 1875, and ascertain and pay the proper compensation, rendered necessary by the taking of private property for public use, which has occurred.

But the railroad has not occupied or used any property of plaintiff, for the only property in question is incapable of use or occupation, or of being acquired and held, and if it has taken any property by the erection of its structure, so that the statutes describing

condemnation proceedings are applicable, such taking must consist of a destruction *pro tanto* of those rights which are regarded as property.

The Court of Appeals having decided in the Story case that property consisting of an easement would be taken, and that compensation might be made by means of the ordinary condemnation proceedings, which proceedings necessarily contemplate the payment of all compensation, once for all, in one bulk sum, has thereby decided, we claim, that this defendant would destroy *pro tanto* the easements or property mentioned. For the only taking of property contemplated in Story's case, or which occurred in this case, has been by this destruction of easements, and if the damage or compensation can be estimated in condemnation proceedings once for all in one bulk sum, it must be because the easements are regarded as *pro tanto* permanently destroyed.

The general legal presumption must undoubtedly be, that that which is contrary to the law will not be permitted to remain indefinitely in the future, and this railroad has been regarded as a wrongdoer, in that it did not first pay for the easements destroyed by it.

A structure, therefore, erected contrary to law could not ordinarily be regarded as presumably permanent.

A marked difference, however, which distinguishes the present structure from a similar one erected by an ordinary wrongdoer, consists of the fact that the company which has erected it has been authorized by the Legislature to exercise the State's power of eminent domain.

The statute has expressly given this company power to assess and pay the amount of private damage, and thus to perpetuate the existence of the structure and its use.

Thus, if at any point of time the full rights of all parties be adjusted, it will be found that the abutter

who has suffered damage has left him as an ultimate right no more than a right to compensation.

He cannot, without disobeying the law and committing a crime, remove the road, and even the effect of the decree of a court of equity, forbidding the maintainance of the structure, may be avoided by a resort to the statutory power to perpetuate the same, as there could not be found any precedent for a decree forbidding absolutely the maintenance of such a road, by a corporation to whom the State had delegated for public purposes its power of eminent domain, if such company should exercise the powers thus conferred.

See Henderson vs. N. Y. Central Co., 78 N. Y., 423.

See also Hatch vs. Cin. & Ind. R. R. Co., 18 Ohio State, 92:

This was an action at law for damages. The damages asked by plaintiff are described at p. 103 of that case.

The plaintiff was the owner of land, through which a canal company had formerly constructed a canal having for such purpose acquired the necessary property in or rights over plaintiff's land.

Under some arrangement between the canal company and the defendant railroad company, the defendant constructed and operated a railroad along the canal bed, claiming to have acquired all the canal company's rights and property, and claiming that no property remained in plaintiff.

Plaintiff sought to recover the value of the strip of land occupied and other amounts for other items of damage.

The opinion of the Court, at p. 118, contains the following:

"What is the nature of the plaintiff's case, as made by himself, and on what theory in respect to it does he begin and proceed in it? It is not an action for the as-

sertion of title to, nor for the recovery of possession of, real estate, nor for the recovery of damages for trespass on real estate; but, both from the allegations of the petition and from the matters of fact proposed to be offered in evidence to the jury, it is apparent that his action is and was intended to be one for the recovery of compensation on account of the permanent appropriation by the railroad company of his land to its use, and of incidental damages thereby accruing to his other lands for all time to come. He questions the right and authority of the railroad company to make the appropriation against the canal company, but proceeds upon the assumption that the appropriation has, in fact, been made; and it is apparent that the case was tried in the Court below on this assumption."

After eliminating all question of the relative rights of the canal and railroad companies, the Court states (p. 119):

"As against him (plaintiff) the right of the railroad company to make the appropriation by a proper proceeding is unquestionable. How, then, stands the case as to him? As before observed, he does not, in this action, seek to contest the fact of appropriation, nor to undo it. He does not seek to recover the land from, nor to enjoin its use by the railroad. And, indeed, it is not apparent how he could successfully do either."

The Court then proceeds to state that if plaintiff stood by with full knowledge of what was being done, and saw the canal filled up and the railroad constructed under a claim of right to such action, without an attempt to prevent the same, he would not be permitted to contest the appropriation as an accomplished fact.

The Court then states (p. 122) that in this action of law for damages the plaintiff was entitled to recover the full value of such land as was taken, and not embraced in the former appropriation of the Canal Company as well as damages for the additional burden placed upon the land originally appropriated.

The opinion reads (p. 122) :

" As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of a canal, he had rights which the railroad company cannot be permitted to ignore ; and which we think it ought to have instituted proceedings regularly, under the statute, to condemn and pay for, before it ventured to divert the easement to uses so variant from those originally intended. But this not having been done, and the plaintiff having resorted to this action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding."

This case is not presented as an authority upon the question as to the rights of the original canal company and the subsequent railroad company, as that might involve a consideration as to the estate which the canal company's charter allowed it to acquire. It is presented as an illustration of the difference as to presumable permanency of the works of a corporation endowed with the power of eminent domain, as contrasted with the works of an ordinary wrongdoer possessing no legislative authority.

In another case of Goodwin vs. Cin. & W. Canal Co., 18 Ohio St., 169 (at p. 179), the Court said : " Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the property of the owner cannot be reclaimed, and that there only remains to him a right of compensation."

It may be observed that the property under discussion in these cases was actual land, to the recovery of the value of which in an action at law, and passage of title to which by payment a judgment .at law, there would be obstacles in New York State. The principle involved in the decision of these cases, therefore, has particular force when applied to the facts in the case at bar, where no such technical obstacle intervenes.

Lest it should be thought that this decision of the Supreme Court of Ohio in the case of Hatch vs. Cin. & Ind. R. Co. (*supra*) was due to any looseness of the fundamental law relating to the acquisition by the public of private property, we print below the constitutional provisions in force at the time of that decision.

Constitution of Ohio of 1851, 2 Revised Statutes of Ohio (1886), p. 1730—Bill of Rights, Sec. 19: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads which shall be open for the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured for a deposit of money; and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner.

Constitution, Art. 13, Corporations, Sec. 5 (p. 1763, Rev. Stat.):

"No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law,"

The statutes (1 Rev. Stat., §§ 3281, 3282, 3283, &c., 2 R. S., §§ 6414, 6453) (1869), relate to condemnation proceedings.

Trenton Water Power Company vs. Chambers, 9 New Jersey Eq., 471, holds that one who waives his right to have commissioners called, and allows a corporation to take possession of his land without *first* making compensation, or pursuing the mode prescribed by the act, and to expend large sums and make extensive altera-

tions, cannot recover possession of the land upon paying for the improvements. Compensation and remuneration for damage is all a Court will award him.

The Court draws the distinction between an ordinary case where there has been no delegation of the power of eminent domain, and the case of a corporation possessing the same.

At p. 475, the opinion says: "In an ordinary case, "the Court would have no difficulty as between individ- "uals, if the Court could not order a specific perform- "ance, it might permit the (landowner) to take his "land, upon paying for the improvements which he "had induced to be made. The Court cannot do that "in this case. There is only one way to relieve the "parties, and that is to give the defendant compensa- "tion for his land, and remuneration for all damage."

The Court, at pp. 474–475, states that as the corporation had the right and power to take the land, and the landowner had no option about the matter, so far as to whether the company should or should not have the land, all the landowner could require was that the corporation should pursue the prescribed mode in taking possession. In that case the owner had permitted the occupation of the land, before condemnation, and the Court held that the real question between the parties was as to the amount of compensation, and not as to the right of the company's having the land.

See also McAulay vs. W. V. R. Co., 33 Vt., 320, 321.

In which case the landowner took no effective steps to prevent the occupation of his land, although he remonstrated with the contractor's workmen against making the road until his damages were paid. The Court regarded the plaintiff under the facts as one entitled to compensation, and not to the land itself, and judgment of ejectment against the company was refused.

The Ohio idea seems to be somewhat analogous to that of the Court in the case of Noyes vs. Hubbard vs. Chapin, 6 Wend., 461, where the combined effect of a statute and of a verbal consent effected the transfer of title to real estate.

Thus it appears in the case at bar that the bank cannot remove the structure of the railroad, and the Railroad Company defendant could not take down the structure and abandon the operation of the road in front of plaintiff's premises, without thereby forfeiting its charter. The Attorney-General on behalf of the State would have a right at once to bring an action to annul the charter. If the R. R. Co. should remove the structure and abandon the route in front of the bank's premises, and seek to operate the railroad upon other routes remaining, it would, under the statutes, be liable to an action for the annulment of the charter upon the ground that it was exercising franchises not conferred.

Code, § 1798.

Besides liability to indictment, and to an action by the Attorney-General to forfeit the charter, the Railroad Company could be compelled by mandamus to operate the road over the whole route upon which it had been constructed and operated, having once accepted charter and put the road in operation.

Farmers' Loan & Trust Co. vs. Henning, Recr. of R. R., U. S. Circuit Court, 17 Am. L. Reg., N. S., 266, 268, FOSTER, J., states: "It appears to be well supported by authority and reason that the powers and privileges so granted by the charters of this company are permissible only, and not obligatory, and the company could elect whether it would proceed to exercise the franchises thereby granted or whether it would not, and if it chose the latter course the only penalty would be the forfeiture of the rights and privileges conferred * * * But when the company has once built and

operated its railroad between the points named in its charter, the case seems to stand on different grounds, and it seems the company may be compelled by mandamus to carry out the objects for which it was created, and to exercise its charter obligations."

Also see State vs. Hartford & N. H. R. R. Co., 29 Conn., 538, 546,

where the company was compelled to maintain its road over a portion of the route proposed to be abandoned for passenger traffic.

Also The King vs. The Severn & Wye. R. R., 2 B. & Ald., 646, 650.

Union Pac. Co. vs. Hall, 1 Otto, U. S., 343.

It can hardly, therefore, be the natural legal presumption that as the railroad has in fact been constructed and operated, the company owning and operating will disobey the fundamental law of its existence, or take such course with regard to the structure and road as to cause the cessation of the corporation's existence.

The theory for which we contend is, that the structure, as matter of fact, is presumably permanent; that any damage therefore inflicted upon abutting premises by such permanent obstruction of easements, consists of a depreciation in the value of the premises; that this can be measured and recovered in an action at law; that such recovery is a full adjustment of the rights of the parties as to any particular parcel.

But whether or not this prove true, independently of any *assent* of the *parties* to the proposition that the road is permanent, it would appear that the recovery should be measured by the permanent depreciation in the value of the premises in any action where such *assent is given.*

In such case the recovery is had, once for all, and the judgment a bar to any further action.

The New York Court of Appeals has expressly so de-

cided in reference to this railroad in an action at law by an abuttor in which the recovery was measured by the permanent depreciation in the value of the abutting premises, and also decided that such assent of the parties was evidenced by the form of action brought by plaintiff, and by the request of defendant corporation to instruct the jury that the recovery should be measured by the depreciation in value of the premises.

See Lahr vs. Metropolitan El. R. Co., 104 N. Y., 268.

The opinion of the Chief-Justice at p. 293 states :

" This action was brought upon the theory that the " building of defendant's railroad and its operation " constituted a permanent appropriation of the street " for railroad purposes, inconsistent with its use for " street purposes and entitled the plaintiff to recover in " a single action, all the damages occasioned to his " property by such taking."

The opinion states that the case was so tried, and that defendant admitted the permanency of its intended use and requested the Court to charge that total depreciation must be the measure of damage, which charge the Court adopted.

(The defendant in that case had, however, objected throughout the trial to the admission of any evidence upon this theory, and had taken exceptions to the rulings against it. Its only assent was in the request to charge to which the Chief-Justice refers.)

The opinion continues at p. 294 :

" The rule adopted assumes that the cause of action " arose when the railroad was built and put in opera- " tion, and that the liability of the wrongdoer for the " entire damags then became *ascertainable, certain and* " *absolute.*"

Again at page 295 :

" It follows necessarily from the proposition that a " *permanent structure* erected in a street, interrupting

" to any considerable extent the passage of light and " air to adjacent premises, works a *destruction of ease-* " *ments* for such purposes."

In the case at bar, the first trial before Judge SHIPMAN resulted in a verdict for permanent depreciation, in accordance with the allegations of the complaint.

Upon the present trial the bank, the original plaintiff, after introducing evidence applicable to a recovery upon the theory of a continuing trespass, was called upon by the counsel for the railroad to elect which measure of damage should be selected.

Following the theory of the complaint, and of the former trial announced at fols. 70 and 71, that he claimed for *permanent injury* and not for damages up to the present time.

The Court, however, would not permit such course to be pursued, and the railroad company at fol. 114, requested the Court to charge as follows:

" Plaintiff is not entitled to recover in this action for loss of rents or rental value. The recovery in this action, if at all, must be for permanent injury to plaintiff's property by defendant's interference with the easements of light and air."

The Court declined.

The bank has chosen to bring this action upon this theory, and yet has been permitted to estimate and recover damages upon a different theory. It cannot be claimed by the bank that such error is harmless to the Railroad Company, in that the plaintiff might have recovered the amount of the depreciation in value, whereas, it has only chosen to measure its damages by a few years temporary loss of rent or injury to use and occupation for a limited period. This claim will not lie in the mouth of the bank, because it does not appear from the record whether or not this temporary current damage is not greater than any permanent depreciation which may have occurred in the value of the premises. Thus, at page 43, the railroad en-

deavors to ask a witness whether the value of this property at the corner of Twenty-third street and Third avenue has increased since the coming of this railroad structure. But testimony to that effect was shut out by the Court, and the justification for the exclusion of this evidence appears from the opinion of the trial Judge in overruling a motion for a new trial. He says, at page 17 (fol. 43):

"The next question is as to the admissibility of evi-
" dence to show that the general value of the plaintiff's
" building was increased by the building of the defend-
" ant's road. The injury to the permanent value of the
" building was not on trial. The question submitted
" to the jury was as to the injury to the use of the
" building during the time in question. No evidence
" offered bearing upon that question was excluded."

Hence, so far as the record goes, it may well be that although a temporary loss may have occurred at first, due to the interference with the use and occupation, yet, that the railroad company might have shown, had it been permitted, that the value of the premises had been enhanced, not reduced.

It proved true in many instances that the elevated railways in New York caused a temporary loss of rents for a period of a few years, and yet produced in such cases either no permanent depreciation or far less than that anticipated by the owner.

Here in the case at bar we have the assent of both parties to this proposition of the permanency of the structure. The complaint states the permanency, and contains allegations of permanent depreciation, which would be false if the structure were not permanent. The railroad company assents by expressly requesting the Court to charge that the recovery must be measured by the depreciation and not by the loss of rents or interference with the enjoyment.

The case appears to present the same assent, evi-

denced in the same manner, as in the case of Lahr vs. Met. R. Co., before the Court of Appeals.

Third Point.

THE COURT ERRED IN PERMITTING THE JURY TO INCLUDE IN THE VERDICT ANY DAMAGES FOR LOSS OF RENT OR INTERFERENCE WITH THE ENJOYMENT OF THAT PORTION OF THE PREMISES OCCUPIED BY THE BANK ITSELF FOR BANKING PURPOSES.

The Court stated to the jury at fol. 109 :

" In the first place there is a part of the building occupied by the bank itself as a bank. As I understand it, that part has been occupied by the bank for banking purposes during all this time."

The Court then discusses the question as to what damage the bank has thereby suffered.

The Court continued as follows :

" On this subject I am not aware of any testimony as to any direct pecuniary damage, except by being compelled to use gas, and the expense of the gas. If that was in consequence of the structure, and the structure was unlawfully there, then the plaintiff must be allowed for that.

" But that may not be all. If there were other discomforts and inconveniences in the occupation of the building in consequence of the structure in these respects, the plaintiff may be entitled to recover a fair compensation for the damages occasioned by that such as you shall see fit to award under the exercise of your good judgment and sound discretion. It is not given to us in round sums, cash value, by witnesses, but you, as jurymen and as men of good sense and sound judg-

ment, are to estimate it. How much less was the use of the building worth as a bank on account of this structure being there? They are entitled to so much for damage to so much of the bank building as is occupied by the bank itself for banking purposes."

The plaintiff in error has excepted to charge (at fols. 113, 114), in so far as it relates to the right to recover for other discomforts and inconveniences (then being compelled to use gas), occasioned to the portion of the premises occupied by the bank.

There is no evidence anywhere in the case of the employment of additional clerks or of any other additional expense. There is no proof of any loss of business by the bank, in consequence of the existence of the defendant's structure, nor of any particular difficulty on the part of the bank's officers in doing their business. As a matter of fact the bank has, during the whole existence of the Elevated Railroad, continued to do its business in this banking-house precisely as it had done before and it has apparently made no effort to remove therefrom.

Under the charge given by the Court, the jury were at liberty to guess at the amount of discomfort and inconvenience suffered by the officers of the bank and the injury to their feelings arising therefrom, and to guess at the appropriate compensation in damages therefor. It is well settled that a corporation cannot recover, for injuries to the person or feelings, and particularly, that where a corporation has occupied its premises during the whole period complained of, it cannot complain of discomfort to its officers during such occupancy. This has been held in cases precisely parallel to the one at bar.

7th Ward Bank vs. New York El. R. R. Co., Decision of New York Superior Court, General Term, June 15, 1886, 53 N. Y. Superior Ct., 412.

In *Seventh Ward Bank vs. N. Y. El. R. R. Co.*, *supra*, it is said by INGRAHAM, J., SEDGWICK, Ch. J., concurring :

" It is well settled that a corporation can maintain an action of tort for any damage to its property or business, but not for damages to person or character."

In the Shoe and Leather Bank vs. Thompson, 18 Abbott's Practice Repts., p. 416, the presiding Justice says : " There can be no doubt that a corporation may maintain an action for damages to property or business of the corporation, no matter in what way that injury was effected ; whether by trespass, by negligence or by willful acts of any kind causing damage. The true rule seems to be, as to the power of corporations to maintain actions, that they may do so in all cases necessary for the preservation of their property and rights, and for the recovery of any damages occasioned by the wrongs of others, but not for those damages to persons and character for which an individual may recover unconnected with loss or injury to property."

" Another principle is also established, and that is in an action for trespass, where there is no malice shown, and where no right is involved beyond a mere question of property, vindictive or exemplary damages should not be allowed, and that the measure of damages is a matter of law.

" Sedgwick on the Measure of Damages, Chap. 18, pp. 453 and 454. Also p. 36, where it is said :

" ' In all cases growing out of the non-performance of contracts, and in those of infringement of rights or non-performance of duties created or imposed by law, in which there is no element of fraud, willful negligence or malice, the compensation recoverable in damages consists solely of the direct pecuniary loss.

" ' It follows, therefore, that in an action where the recovery is limited to the damages to property caused by the wrong complained of, and the amount of such damage does not appear, and there is no evidence from

which such amount can be ascertained, nominal damage only can be awarded. As was said in Leeds vs. Metropolitan Gas Light Co., 90 N. Y., 29: "Where the loss is pecuniary and is present and actual and can be shown, but no evidence is given to show its extent or from which it can be inferred, the jury can allow nominal damages only.'"

"Applying these rules to the case at bar it appears that this is a case in which vindictive or exemplary damages cannot be allowed, and it is evident that under the rules above stated plaintiff was entitled to recover such damage as was shown by the evidence was actually sustained by it, but if there was no evidence showing the extent of the injury plaintiff is entitled to nominal damages only.

"In this case the only evidence of the damage caused by the trespass between the time of the construction of the defendant's road and the 1st of May, 1882, is evidence of the decrease of the rental value of the property.

"In the case of an individual occupying premises where, by the evidence, it appeared that a nuisance made the premises disagreeable and uncomfortable to the occupant, evidence of the depreciation of the rental value caused by the nuisance, would be some evidence of the amount of the damage sustained by the owner, as showing the extent of the depreciation of the value of the occupation of the property, and this rule of damage was apparently approved in Francis vs. Schoellkopp, 53 N. Y., 154, but in the case of a corporation the fact that the premises occupied by it for its business is made disagreeable and uncomfortable to its agents or employees, is of itself no evidence of damage to the corporation, without additional evidence that the fact that the premises were made disagreeable to occupy caused the corporation additional expense either in the management or carrying on of its business, or in some other way.

"The evidence does not show that if the railroad had not existed in the street the plaintiff would have received anything for the use of the premises. That the use of the premises was made any more difficult or expensive to the plaintiff in consequence of the existence of the railroad or that if the road had not been built the premises would have been used in any other or different way than they were used.

"The fact that its rental value in the market had been depreciated was no pecuniary loss to plaintiff as long as it continued to use the property for its own purposes. It could make no possible difference to the plaintiff whether the property was worth during the period named five hundred or five thousand dollars a year, for the property was not rented."

Fourth Point.

THE COURT ERRED IN ITS RULINGS UPON THE MOTION TO DISMISS THE COMPLAINT AND IN GIVING THE INSTRUCTIONS TO THE JURY UPON THE SUBJECT OF THE CRITERION OF DEFENDANT'S LIABILITY.

The principles announced in the opinion of Judge SHIPMAN were those applicable to the case.

The street was none the less used for legitimate street purposes notwithstanding the existence of the railroad unless the general uses of the street by the public were interfered with.

The evidence failed to show interference with the public use of the street by the public, and no issue was raised for the consideration of the jury.

The whole purpose and use of the railway was to promote travel by the public along the street, and no claim could be made by the bank for damage until the use of

the street was shown to transcend to the proper street use.

THE JUDGMENT SHOULD BE REVERSED.

JULIEN T. DAVIES,
EDWARD S. RAPALLO,
Of Counsel for Plaintiff in Error.

U. S. Supreme Court.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK

against

THE NEW YORK ELEVATED RAILROAD COMPANY.

Take notice that on the affidavit of Wm. F. MacRae, hereto annexed, and the record, and all the proceedings herein, the undersigned will move this Court, at a stated term to be held at the Capitol in the city of Washington, D. C., on the second Monday of October, 1886, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to dismiss the writ of error or appeal from the judgment herein on the ground that the matter in dispute, exclusive of costs, does not exceed the sum or value of $5,000, and for such other relief as may be just, with costs of motion.

Dated, New York, 11th day of September, 1886.

KELLY & MACRAE,
Attys. for Plff. & Respdt.,
237 Broadway,
N. Y.

To DAVIES & RAPALLO, Esqs.,
Attys. for Deft. & Applt.,
32 Nassau St.,
N. Y. City.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT.

THE FIFTH NATIONAL BANK, ETC.,

against

THE NEW YORK ELEVATED RAILROAD COMPANY.

Southern District of New York, ss.:

WM. F. MACRAE, being duly sworn, says that he is one of the attorneys for the plaintiff and respondent herein. That now and up to the time of the decision of the Hon. Judge Wheeler herein on the motion for a new trial deponent was the counsel in charge of this case. That deponent was absent in Europe at the time of the rendering of the opinion by Judge Wheeler and of entry of the judgment thereon. That this action was brought to trial on the 2d day of June, 1886, before Hon. H. H. Wheeler and a jury and a verdict in favor of plaintiff entered on the 5th day of June, 1886, for $5,000.

That defendant then made a motion for a new trial, and to set aside the verdict and obtained a stay of plaintiff's proceedings pending the same. That the decision on said motion was rendered on the 10th August, 1886. That by an oversight, and also the want of familiarity on the part of the managing clerk of deponent's office with the practice, the judgment herein was entered, not as of the original time of the verdict, but at the actual time of entry, to wit, on the 26th day of August, 1886, and included interest from the time of the verdict in addition to the amount of the verdict of $5,000, as rendered by the jury, together with the costs.

That if deponent, who had charge of the case, had been here, said judgment would not have been so

entered, as it was not intended that the judgment should be in form or otherwise for more than $5,000, exclusive of costs.

That the time intervening between the rendition of said verdict of $5,000, and the actual date of entry, which delay was caused by the action of the defendants in procuring a stay of plaintiff's proceedings, caused the Clerk of the Circuit Court to add the sum of $68.33 as interest, and deponent is further informed that said form of judgment and the amount was inserted therein by advice of defendants' attorneys, and contrary to the desire of deponent, who informed said attorneys, in the presence of the Court, at the time of the verdict being rendered, that plaintiff's attorneys did not intend to make the judgment any more than said $5,000, and deponent hereby withdraws so much of said judgment as includes interest, and hereby stipulates to waive the same.

WM. F. MACRAE.

Sworn to before me, this
11th Sept., 1886.

EDW. C. CHRISTIE,
[SEAL.] Notary Public,
N. Y. Co.

Service of a copy of the Affidavit, Notice of Motion, and Brief of Deft. in Error herein, is hereby admitted.

Dated, New York, September 16, 1886.

DAVIES & RAPALLO.

U. S. SUPREME COURT.

THE FIFTH NATIONAL BANK, ETC.,

against

THE NEW YORK ELEVATED RAILROAD.

Brief on motion to dismiss writ of error and the appeal herein.

Facts.

I.

This was an action brought in the Circuit Court of the United States for the Southern District of New York by the defendant in error to recover damages for injuries to its real estate and premises by the plaintiff in error.

The action was brought to trial before the Honorable Hoyt H. Wheeler, sitting as Circuit Judge, and a jury on the 2d day of June, 1886, and a verdict therein rendered on the 5th day of June, 1886, in favor of defendant in error for $5,000.

That at the time of the rendition of the said verdict a motion to set aside said verdict and for a new trial was made, and a day was fixed for the hearing of the same, with a stay of proceedings. That said motion was thereafter heard by Mr. Justice Wheeler, and a decision thereon made on the 10th August, 1886, denying said motion. That judgment was entered herein on the 26th day of August, 1886, but that said judgment in form contained the accrued interest between the rendition of the verdict and the time of entering judgment, whereas the judgment should have been entered for the exact amount of the verdict, besides costs, and would have been so only for the absence of the counsel familiar with the case of defendant in error, but that as appears by his affidavit said interest is waived.

Points.

I.

The subject matter involved in this appeal, exclusive of costs, is only $5,000, and the Supreme Court is therefore, under the statute, without jurisdiction to hear this appeal, and the writ of error should be dismissed.

18 U. S. Stat., 316.
Walker *v.* U. S., 4 Wall, 163.
West. Un. Co. *v.* Rogers, 93 U. S., 565.
B. & P. R. R. Co. *v.* Trook, 100 U. S., 112.
Merrill *v.* Petty, 16 Wall, 338.
Hilton *v.* Dickinson, 108 U. S., 165.

II.

The subject "matter in dispute" *is the amount of the verdict*, and that being only $5,000 no review by the Supreme Court will lie.

It can make no difference that interest has accrued in the meantime, and been added in the judgment. The "*matter in dispute*," the subject of grievance, is the verdict, and not the interest, and jurisdiction depends on that, and that being only $5,000 exclusive of costs, the Supreme Court obtains no jurisdiction.

Knapp *v.* Banks, 2 How., 73.
Walker *v.* U. S., supra.

And see

Joseuz *v.* Conner, 75 N. Y., 156.

III.

Defendant in error has a right to waive or release *any part* of the judgment, and as it releases or waives the accrued interest between the time of the rendition of the verdict and the time of the entry of judgment, the subject, or "matter in dispute" *must necessarily only be $5,000*, exclusive of costs, and consequently no jurisdiction to review can exist by the Supreme Court.

Defendant in error *waiving this interest*, plaintiff in error cannot allege it as in *dispute*.

First National Bank *v.* Reddick, 110 U. S., 224.
Brown *v.* Sigourney, 72 N. Y., 122.

IV.

The motion to dismiss the writ of error or appeal should be granted with costs.

KELLY & MACRAE,
Attys. for Deft. in Error.

WM. H. ARNOUX and
WM. F. MACRAE,
Of Counsel.

U. S. Supreme Court.

THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK,

against

THE NEW YORK ELEVATED RAILROAD COMPANY.

Take notice that on the affidavit of Wm. F. MacRae, hereto annexed, and the record, and all the proceedings herein, the undersigned will move this Court, at a stated term to be held at the Capitol in the city of Washington, D. C., on the second Monday of October, 1886, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to dismiss the writ of error or appeal from the judgment herein on the ground that the matter in dispute, exclusive of costs, does not exceed the sum or value of $5,000, and for such other relief as may be just, with costs of motion.

Dated, New York, 11th day of September, 1886.

KELLY & MACRAE,
Attys. for Plff. & Respdt.,
237 Broadway,
N. Y.

To DAVIES & RAPALLO, Esqs.,
Attys. for Deft. & Applt.,
32 Nassau St.,
N. Y. City.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT.

THE FIFTH NATIONAL BANK, ETC.,

against

THE NEW YORK ELEVATED RAILROAD COMPANY.

Southern District of New York, ss.:

WM. F. MACRAE, being duly sworn, says that he is one of the attorneys for the plaintiff and respondent herein. That now and up to the time of the decision of the Hon. Judge Wheeler herein on the motion for a new trial deponent was the counsel in charge of this case. That deponent was absent in Europe at the time of the rendering of the opinion by Judge Wheeler and of entry of the judgment thereon. That this action was brought to trial on the 2d day of June, 1886, before Hon. H. H. Wheeler and a jury and a verdict in favor of plaintiff entered on the 5th day of June, 1886, for $5,000.

That defendant then made a motion for a new trial, and to set aside the verdict and obtained a stay of plaintiff's proceedings pending the same. That the decision on said motion was rendered on the 10th August, 1886. That by an oversight, and also the want of familiarity on the part of the managing clerk of deponent's office with the practice, the judgment herein was entered, not as of the original time of the verdict, but at the actual time of entry, to wit, on the 26th day of August, 1886, and included interest from the time of the verdict in addition to the amount of the verdict of $5,000, as rendered by the jury, together with the costs.

That if deponent, who had charge of the case, had been here, said judgment would not have been so

entered, as it was not intended that the judgment should be in form or otherwise for more than $5,000, exclusive of costs.

That the time intervening between the rendition of said verdict of $5,000, and the actual date of entry, which delay was caused by the action of the defendants in procuring a stay of plaintiff's proceedings, caused the Clerk of the Circuit Court to add the sum of $68.33 as interest, and deponent is further informed that said form of judgment and the amount was inserted therein by advice of defendants' attorneys, and contrary to the desire of deponent, who informed said attorneys, in the presence of the Court, at the time of the verdict being rendered, that plaintiff's attorneys did not intend to make the judgment any more than said $5,000, and deponent hereby withdraws so much of said judgment as includes interest, and hereby stipulates to waive the same.

WM. F. MACRAE.

Sworn to before me, this
11th Sept., 1886.

EDW. C. CHRISTIE,
[SEAL.] Notary Public,
N. Y. Co.

Service of a copy of the Affidavit, Notice of Motion, and Brief of Deft. in Error herein, is hereby admitted.

Dated, New York, September 16, 1886.

DAVIES & RAPALLO.

THE FIFTH NATIONAL BANK, ETC.,

against

THE NEW YORK ELEVATED RAILROAD.

Brief on motion to dismiss writ of error and the appeal herein.

Facts.

I.

This was an action brought in the Circuit Court of the United States for the Southern District of New York by the defendant in error to recover damages for injuries to its real estate and premises by the plaintiff in error.

The action was brought to trial before the Honorable Hoyt H. Wheeler, sitting as Circuit Judge, and a jury on the 2d day of June, 1886, and a verdict therein rendered on the 5th day of June, 1886, in favor of defendant in error for $5,000.

That at the time of the rendition of the said verdict a motion to set aside said verdict and for a new trial was made, and a day was fixed for the hearing of the same, with a stay of proceedings. That said motion was thereafter heard by Mr. Justice Wheeler, and a decision thereon made on the 10th August, 1886, denying said motion. That judgment was entered herein on the 26th day of August, 1886, but that said judgment in form contained the accrued interest between the rendition of the verdict and the time of entering judgment, whereas the judgment should have been entered for the exact amount of the verdict, besides costs, and would have been so only for the absence of the counsel familiar with the case of defendant in error, but that as appears by his affidavit said interest is waived.

Points.

I.

The subject matter involved in this appeal, exclusive of costs, is only $5,000, and the Supreme Court is therefore, under the statute, without jurisdiction to hear this appeal, and the writ of error should be dismissed.

18 U. S. Stat., 316.
Walker *v.* U. S., 4 Wall, 163.
West. Un. Co. *v.* Rogers, 93 U. S., 565.
B. & P. R. R. Co. *v.* Trook, 100 U. S., 112.
Merrill *v.* Petty, 16 Wall, 338.
Hilton *v.* Dickinson, 108 U. S., 165.

II.

The subject "matter in dispute" *is the amount of the verdict*, and that being only $5,000 no review by the Supreme Court will lie.

It can make no difference that interest has accrued in the meantime, and been added in the judgment. The "*matter in dispute*," the subject of grievance, is the verdict, and not the interest, and jurisdiction depends on that, and that being only $5,000 exclusive of costs, the Supreme Court obtains no jurisdiction.

Knapp *v.* Banks, 2 How., 73.
Walker *v.* U. S., supra.

And see

Joseuz *v.* Conner, 75 N. Y., 156.

III.

Defendant in error has a right to waive or release *any part* of the judgment, and as it releases or waives the accrued interest between the time of the rendition of the verdict and the time of the entry of judgment, the subject, or "matter in dispute" *must necessarily only be $5,000*, exclusive of costs, and consequently no jurisdiction to review can exist by the Supreme Court.

Defendant in error *waiving this interest*, plaintiff in error cannot allege it as in *dispute*.

First National Bank *v.* Reddick, 110 U. S., 224.
Brown *v.* Sigourney, 72 N. Y., 122.

IV.

The motion to dismiss the writ of error or appeal should be granted with costs.

KELLY & MACRAE,
Attys. for Deft. in Error.

WM. H. ARNOUX and
WM. F. MACRAE,
Of Counsel.

Office Supreme Court
FILED.
NOV 13 1889
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

THE NEW YORK ELEVATED RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE FIFTH NATIONAL BANK OF NEW YORK,

DEFENDANT IN ERROR.

BRIEF FOR RESPONDENT.

WM. F. MACRAE,
of Counsel.

Supreme Court of the United States.

THE NEW YORK ELEVATED RAILROAD COMPANY,

PLAINTIFF IN ERROR,

against

THE FIFTH NATIONAL BANK OF NEW YORK,

DEFENDANT IN ERROR.

Points for Respondent.

STATEMENT OF CASE.

This case comes before this Court upon a writ of error to the United States Circuit Court for the southern district of New York, to review a judgment in favor of the defendant in error for $5,068.33 against plaintiff in error in an action tried before Hon. H. H. Wheeler, Judge, and a jury.

This action was brought by the Fifth National Bank, in the city of New York, against the New York Elevated Railroad of that city, to recover damages for injury to its premises held in fee, situated southwest corner of Third Avenue and Twenty-third street in said city. The building of said bank is four stories in height (fol. 57).

It *fronts* on Third Avenue to a width of 30 feet and ¾ of an inch. Its depth is 70 feet and has its side for that distance along 23d Street. The rear of the building is 38 feet and ¾ of an inch in width.

The description in the deeds of said premises to said Bank bounds the same in front "along Third Avenue," and on the side also "along Twenty-third street" (fols. 54–56), and thereby said Bank claims to the centre of the street.

The said Bank was used as to the first floor above the street as a banking-house; the second, third, and fourth stories were used for family apartments, and the basement for insurance and like business purposes (fol. 57). The 3d Avenue and 23d Street are each 100 feet in width.

That the plaintiff in error has an Elevated Railway which runs along on both sides of 3d Avenue on a track and bed, 15 feet wide, supported by uprights, at an elevation of 15 feet, which sustains and carries trains and locomotives along its track almost constantly (fol. 56).

At this corner of the Avenue the said Elevated Railway has its station, with stairs leading thereto and therefrom, and at which passengers get on and off, and its whole structure at this point almost entirely covers the street.

The complainant claims and the jury found that the said Elevated Railway and structure affects and impairs the use and rental value of said Bank's premises by the deprivation of light, air, and access, and assessed the damages at $5,000.

The exceptions of the plaintiffs in error raise the questions substantially—

(1) That the Bank was not upon the evidence entitled to any damages, for the reason that the *damages testified to* as having been sustained were not *affirmatively shown* to be the result *solely* of the *structure* of the Railway, but that it was composed of other elements connected with the operations

of the road, such as noise, smoke, and cinders, which were not competent elements of damage.

See motions to direct a verdict for defendant (fols. 80–82 and 105.)

(2) To the admission or rejection of testimony in arriving at the damages.

(3) To the charge, and refusal to charge of the Court on the measure and elements of damages.

Point I.

The first exception we will treat as raising the question of the Bank's right to recover *any* damages on the evidence.

The verdict of the jury conclusively established that the Railway's structure as a *structure in the street* in close proximity to plaintiff's building was a taking and interference with the rights of property of the Bank which entitled it to damages therefor.

This was in harmony with the law of the State of New York applicable to Elevated Railways, as declared over and over again by its tribunals.

Story *v.* The N. Y. Elevated R.R. Co., 90 N. Y., 122.
Lahr *v.* Metropolitan Elevated Railway, 104 *id.*, 268.
Drucker *v.* Manhattan Railway, 106 *id.*, 160.
Mahady *v.* Bushwick R.R., 91 *id.*, 153.
Henderson *v.* N. Y. C. R.R., 79 *id.*

In the case of Lahr *v.* The Elevated Railway, *supra*, it was attempted on the part of the Railway to reopen the decision in the *Story* case, *supra*, but unsuccessfully, and that case reaffirmed the following propositions as having been decided by the Story case.

Ruger, C. J., before formulating these propositions, said :

"The endeavor to secure a re-examination of the doctrines of that case (Story case) must fail, since the decision there made embodied the deliberate judgment of the court, pronounced after the most careful and thorough consideration, and after two arguments at the bar made by most eminent counsel had apparently exhausted the resources of learning and reason in the discussion of the question presented."

He then proceeds:

"We then hold that the Story case has definitely determined:

"First. That an elevated railroad in the streets of a city operated by steam-power and constructed, as to form, equipments and dimensions, like that described in the Story case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction without *providing compensation* for the injury inflicted upon the property of abutting owners.

"Second. That abutters upon a public street claiming title to their premises by grant from the municipal authorities which contains a covenant that a street to be laid out in front of such property shall forever thereafter continue for the free and common passage of and as public steeets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, *acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.*

"Third. That the ownership of such easement is an interest in real estate, constituting *property* within the meaning of that term as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use.

"Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent in a public street, and

upon which cars are propelled by steam-engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, *constitutes a taking of the easement and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking.*

"The jury in this case, under the instructions of the court, have found upon evidence which justifies the finding that the structure of the defendant in Amity street, in connection with the running of cars thereon propelled by steam-engines, with the consequences naturally flowing therefrom, constitutes an employment of the street for purposes not originally designed, and a perversion of its use from legitimate street purposes.

"Assuming, therefore the binding force of the decision in the Story case, we will, where they are raised by sufficient exceptions, proceed to examine some distinctions claimed by the appellant to exist between the cases.

"Among other things it is claimed that the Story case is an authority only where abutting owners hold title to their property under conveyances similar to that of Story's, and that abutters claiming under any other tenure than that of a deed from a municipality containing covenants protecting the street from any other use than that of a public street do not come within the principles there determined.

"This claim, we think, is not well founded. We are of the opinion that no legal difference exists with reference to the interest acquired by abutting owners in a public street between that afforded by a title conferred under such a deed as Story had or that acquired through a series of mesne conveyances from the original *owner, whose property had been taken by proceedings* in invitum *instituted by the municipality under a public statute to acquire land for street purposes*, which statute provided that the land thus taken should be held 'in trust, nevertheless, that the same be appropriated and kept open for or as part of a public street * * * forever in like manner as the other public streets * * * in the said city are and of right to be.'

"Such proceedings created not only a valid trust in the city for the purposes expressed, which precluded it from authorizing any other use of the land acquired than that expressly described in the statute, (Cooley on Const. Limitations, 331), but also constitute a contract between the public and the abutting owners severally, by which the liabilities, rights and interests of the respective parties are to be measured, and the enjoyment of their respective interests in the property (retained as well as acquired) regulated and determined." * * *

"An abutting owner necessarily enjoys certain advantages from the existence of an *open street adjoining his property*, which belongs to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property.

"These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

We have cited thus fully from this opinion because, taken in connection with the decision in the Story case, it is quite exhaustive of the law of New York State on the subject of the elevated railways to abutting owners.

But to the same effect are the decisions of this Court with reference to surface railroads using *steam locomotives*.

Baltimore & Potomac R.R. *v.* Fifth Baptist Church, 108 U. S., 317.

Barney *v.* Keokuk, 94 U. S., 324.

Also of the courts of other States.

Rigney *v.* City of Chicago, 102 Ill., 64.

Cairo R.R. Co. *v.* People, 92 Ill., 170.
Cox *v.* Louisville R.R., 48 Ind., 178.
Hinchman *v.* Pat. Hose Co., 17 N. J., 75.
Atchinson *v.* R.R. Co., 10 Kan., 552.
Railroad Co. *v.* Coombs, 10 Bush. (Ky.), 382.

And so are the English cases—

Buccleugh *v.* Met. Board of Works, 5 L. R. (H. of L. cases), 404 ; 2 Moak's Eng. Rep., 473.

Point II.

The law of the State of [redacted], as declared by its highest tribunal, becomes the rule of decision for the courts of the United States in civil actions at common law not arising under the laws of the United States.

U. S. Rev. Stat., § 721, § 34, Act of 1789.
Livingston *v.* Moore, 7 Peters, 469.
Owings *v.* Hull, 9 *Id.*, 607.
Pennington *v.* Gibson, 16 How., 65.

In administering the local law of the State the courts of the United States follow implicitly the settled decision of the courts of last resort of the State in question.

Mutual Ass. Society *v.* Watts., 1 Wh., 279.
Shipp *v.* Miller, 2 *Id.*, 316.
New England Screw Co. *v.* Bliven, 3 Blatch., 249.
Scipio *v.* Wright, 101 U. S., 665.
Boyer *v.* Tabb, 18 Wall., 346.

Point III.

The exceptions on the trial are without merit.

The 2d exception presents no ruling of law whatever.

The 3d and 4th exceptions should be overruled on the obvious ground that the evidence excluded was entirely irrel-

evant, as it didn't appear where these flats *were*, or how they *compared with* those of the Bank, or whether they were situated in like *predicament*.

The 5th exception presents no ruling that affected the plaintiff in error.

The 6th and 7th exceptions relate to excluding hypothetical evidence as to what effect would result to the Bank if the opposite building thereto were elevated to an equal height with the Bank.

The 8th exception is to the exclusion of evidence as to whether the value of the bank building had not *increased* since the Railroad came there. The exclusion of this evidence could not have hurt the Railway, for if the answer was in the affirmative, it only showed that the rental value was affected all the more.

But benefit of this character has always been excluded in arriving at damages.

Aside from the consideration, both the Rapid Transit Act Laws of 1875 (Ch. 606, Sec. 20), and the General Railroad Act as expounded by the courts of New York, prohibit any allowance or deduction on account of *any real or supposed benefits* flowing from the construction of the railroad.

Matter of W. S. R.R., 35 Hun., 260.
Francis *v.* Schoelkopf, 53 N.Y., 155.

The further claim that the witnesses did not, with precision, divide the damage caused, by the structure apart from the operation of the road, and therefore the damages ought to be *nominal*, is not sustained by the authorities. The Courts hold that the abutting owners are not obliged to prove their damages with precision.

Schile *v.* Bruckhaus, 80 N.Y., 614.
Lahr *v.* Met. R.R. Co., *supra*.

Point IV.

The exceptions to the charge of the Court as to the *measure of damages* to be found by the jury, and to the refusal to charge, do not exhibit any ground of error.

These exceptions came *too late.*

The trial of the cause had proceeded upon the theory, entirely acquiesced in by plaintiff in error, of limiting the recovery to *consequential damages up to the time of the trial*, viz., loss of rents and other incidental damages.

Record, fol. 71.

The Bank claimed damages on the theory of the *permanency* of the structure, and thus to recover "once for all" the whole of its damages.

The counsel for the Railroad objected to this and the evidence was excluded. (Record, fol. 70.) And then it was that the Court ruled that the Bank was to be limited as to evidence of damages to the time of the trial; to which no exception was taken by the counsel for the Railroad (fol. 71). This became the law of the case and the ruling bound the defendant in the action as well as plaintiff.

It would be exceedingly improper and unjust after the *evidence was all in*, and the case tried and submitted on the Railroad's *own theory*, that they should claim that that theory ought to be at that late stage wholly disregarded, and the case sent to the jury on *the abandoned theory* brought about by themselves.

No such trifling, or rather juggling, with a trial should be allowed. The orderly administration of justice requires other procedure.

Thayer *v.* Marsh, 75 N. Y., 342.

Roberts *v.* Graham, 6 Wall., 578.

Marine B'k *v.* Fulton Bank, 2 *Id.*, 252.

Perkins *v.* Ingersoll, 1 Dill., 417.
Lahr *v.* Met. Elevated R. Co., 104 N. Y., 294.
Hussner *v.* Brooklyn City R.R., 114 *Id.*, 436.

The exception to the charge of the Court as to the loss of rents is uncertain and insufficient at best. There was no request to *limit* the damages to the *time of the commencement of the action.* The exception claimed is this:

"To the ruling and instruction in the foregoing charge to *allow* the plaintiff such damages as it has sustained by reason of the *erection* up to *that present time*, the counsel for the defendant did then and there duly except" (fol. 113).

The request to the Court was that—

"Plaintiff is *not entitled to recover in this action for loss of rents or of rental value.* The recovery in this action, *if at all*, must be for *permanent injury* to the plaintiff's property by the defendant's interference with light and air" (fol. 114).

It will be thus perceived that the exception of counsel did not convey any instruction to the Court discriminating as a limitation in the jury's enquiry *to the time of the commencement of the action*, but coupled with the request involved clearly the instruction that the jury could not find damages "*at all*" for loss of rents, or rental value, but only for *permanent injury.*

The exception, therefore, is clearly unavailable.
Roberts *v.* Graham, 6 Wall., 578.

"Errors" in a charge by the Court to a jury "must be shown *affirmatively*, and cannot be predicated except upon a refusal to charge some *specific* proposition."
Disten *v.* Rose, 69 N.Y., 126.
McGinley *v.* U. S. Ins. Co., 77 *Id.*, 427.

Point V.

The question of what the measure of damages should be in a case of this kind is uncertain at best.

The Courts of New York have found considerable difficulty in dealing with it, and have permitted judgments to stand in jury actions when the damages have been recovered *up to the time of trial*, as in Hassner *v.* Brooklyn City R.R., 114 N.Y., 436, and for *permanent* damages, as in Lahr *v.* Met. Elevated R.R. Co., 104 N.Y., 294.

This was allowed because the actions were *tried on these respective theories*, and we claim that these authorities sanction the measure of damages adopted in the case at bar, as defendant acquiesced therein on the trial.

That the ruling of the Court in permitting a recovery to the time of trial in this case was erroneous we by no means concede.

There is ample authority for the ruling. Mayne on Damages (Wood's Ed.) lays down the rule thus, section 103, p. 136: "Cases of much greater difficulty often arise when the question *is up to what time* subsequent to the cause of action damages may be assessed, whether they must be limited by the commencement of the action or may be calculated *up to time of verdict* or to an indefinite period afterwards. The result of these decisions seems to be that damages arising subsequent to action brought *or even to the date of verdict* may be taken into consideration when they are the natural and necessary result of the act complained of, and when they do not themselves constitue a new cause of action."

And illustrations of this rule are cited. Continuing, the learned author says:

"Similar questions often arise in cases where a person by digging, mining, building or the like, affects the plaintiff's

land or house in such a manner as to produce injurious consequences, which manifest themselves at a later period. Here it is now settled that all *subsequent or necessary damage* may be assessed, and can only be recovered in a suit brought upon the original cause of action. If the act which causes the damage is in itself unlawful, as, for instance, a trespass upon the plaintiff's land, then it is the cause of action. If it is lawful in itself, as, for instance, some act done by the defendant on his own land, which becomes unlawful by the injury it produces to the plaintiff, the cause of action dates from the injury. But in *either case* when once a right of action has accrued no fresh damage will entitle a party to a fresh suit."

Finally, in summing up the difficulties of the subject he says (§ 111, p. 142):

"In fact the whole law upon the subject of damages in the case of continuing nuisances or trespasses seems in a very unsatisfactory state," and concludes: "The fair rule would be to give the plaintiff such damages as would compensate him for the loss sustained up to *the time of verdict*, and would pay him for putting the land into its original state."

The author cites the following cases as sustaining the doctrine of the text:

Nicklin *v.* Williams, 10 Ex., 259.
Hamer *v.* Knowles, 6 H. & N., 454.
Backhouse *v.* Bonnie, 9 H. of L., 503.
Shorbridge *v.* Lamplugh, 2 Ld. Ray, 803.
Also see Lamb *v.* Walker, 3 Q. B. Div.
And see Taylor *v.* Manhattan R. Co., 53 Hun., 306.
Everson *v.* Powers, 89 N. Y., 527.
Fowle *v.* N. H. & Northampton R.R., 112 Mass., 338.

It will be contended, however, that the Court of Appeals of New York has decided that in common law or jury actions

only damages to the time of the *commencement of the action* can be recovered.

Uline *v.* N. Y. C. R.R., 101 N. Y., 98.
Pond *v.* Met. R.R. Co., 112 *id.*, 186.

These cases are not authorities against the defendant in error here because the recovery in these cases was on the theory of *permanent* damages. They are, however, direct authority *against* the instructions asked for by the counsel for the plaintiff in error in this case, viz., that "plaintiff is not entitled to recover in this action for loss of rents or of rental value. The recovery in this action, if at all, must be for *permanent* injury to the plaintiff's property by the defendant's interference with light and air." (Record, fol. 114.)

These cases hold that this rule of recovery asked for by the counsel is not admissible in an action at *law*, but only in equity.

The disposition of the case made by the Court below infringed no substantial rights of the Railroad Company. It was rather an advantage to it. It permitted the jury to find the damages down to the *trial* and thus obviating another action or successive actions. And as the recovery will be a bar to any new action for the time covered by the verdict it is impossible to see how defendant was harmed.

Hassner *v.* Brooklyn City R.R., *supra*.

Damages up to the time of trial was also allowed in the case of Nat. Exchange Bank *v.* Met. Elevated R.R. Co., 53 Supr. Ct., 512. Affirmed in the Ct. of Appeals, 108 N.Y., 660.

The complaint in the action was framed on the theory of recovering for *future* damages (fol. 9), and if evidence as to damages posterior to the action had been objected to, which

was not done, the future damages, if necessary, might have been brought in by supplemental complaint.

New York Code, Sec. 544.

See Fincke *v.* Rourke, 20 How., 264.

Third Ave. R.R. *v.* N.Y. El. R.R., 19 Abb. N.C., 262.

Any way it was matter of discretion and is not reviewable.

Chirac *v.* Reimecker, 11 Wh., 280.

The exception as to that part of the charge of the Court relating to the recovery for other discomforts and inconveniences than being compelled to use gas to so much of the bank building as is occupied by the Bank itself for banking purposes (Record, fols. 110, 113) discloses no ground of error.

This part of the charge is in conformity to the law as expounded by this Court.

Balt. & Pot. R.R. Co. *v.* Fifth Bap. Ch., *supra.*

Field, J., writing the opinion of the Court, said:

"The right of the plaintiff to recover for the *annoyance and discomfort to its members in the use of its property*, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character.

"Whatever interferes with the *comfortable use of their property for the purposes of their formation* is as much the subject of complaint as though the members were united by some other than a corporate tie. * * * Whatever prevents the comfortable use of this property for public worship is a disturbance and annoyance as much so as if access to the church was impeded and rendered inconvenient and difficult. * * * As with a blow in the face there may be no arithmetical rule for the estimate of damages, there is, however, an *injury*, the extent of which the jury may measure."

Apropos of this it will readily be acknowledged that the taking in and paying out of money in the counting-room of a Bank, the detection of spurious, forged, or simulated bills, would be seriously interfered with by reduced light, or volumes of steam and smoke such as the Elevated Railroad emits.

Point VI.

The assignment of errors should be overruled and the judgment below affirmed.

WM. F. MacRAE,
of Counsel.

12 Orig 43

IN THE

Supreme Court of the United States.

ORIGINAL DOCKET.

CHARLES MASON LANE, otherwise called CHARLES LANE, ex-parte.

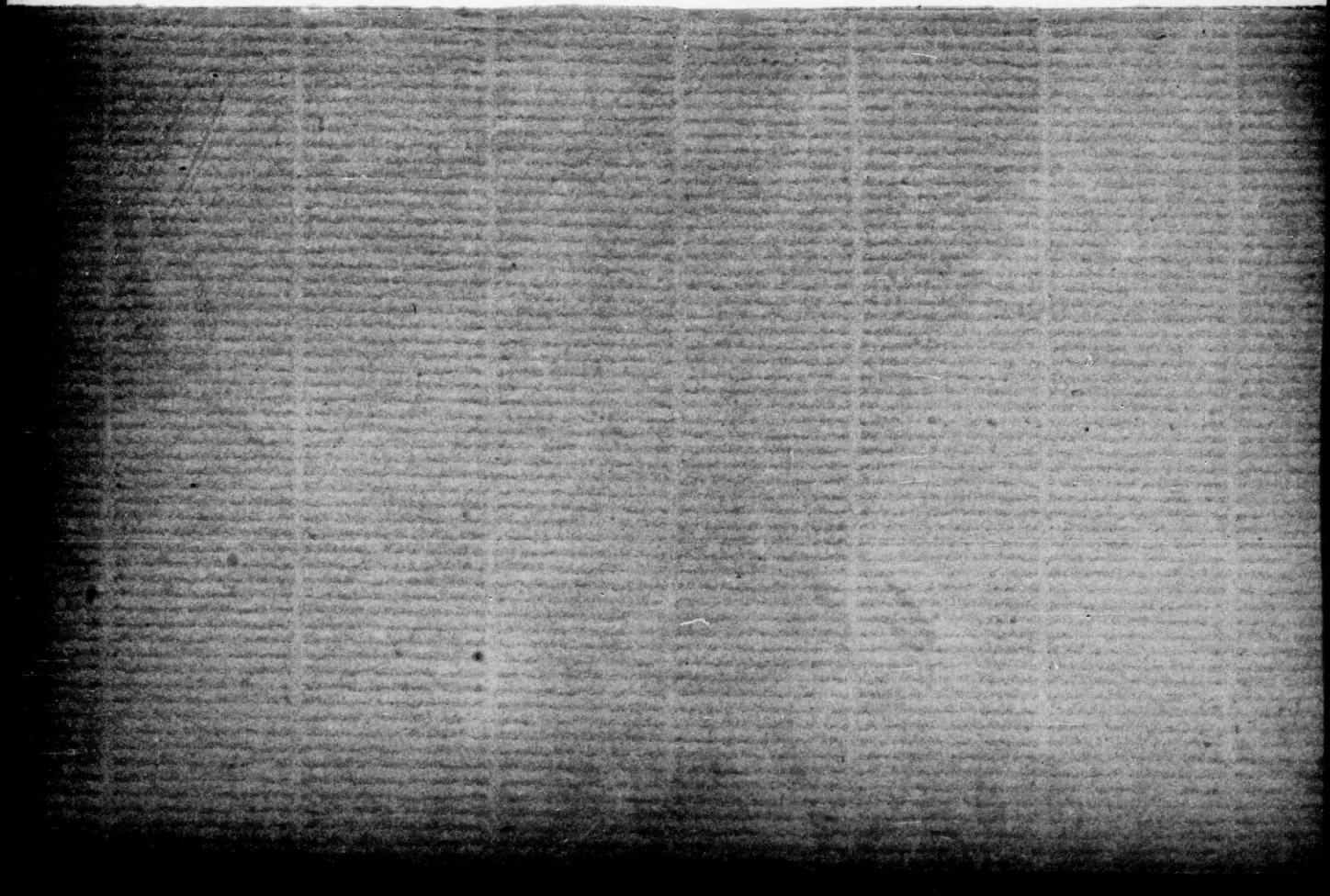
Motion for Leave to File Petition for Writs of Habeas Corpus and Certiorari.

MOTION, PETITION, AND EXHIBIT "A" TO THE PETITION.

135443

WM. M. RANDOLPH,
A. H. GARLAND,
H. J. MAY,
Counsel for Lane.

PRESS OF THOMAS McGILL & CO.



IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

CHARLES MASON LANE, otherwise called CHARLES LANE,

EX-PARTE.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

The said Lane, by counsel, respectfully moves the court for leave to file the accompanying petition for writs of habeas corpus and certiorari, to be directed as therein prayed for; and he refers to such petition and Exhibit A, therein mentioned, for a full statement of the facts upon which his motion is based, and the objects of such motion.

WM. W. RANDOLPH,
A. H. GARLAND,
H. J. MAY,
Counsel for Lane.

PETITION.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Chief Justice and Associate Justices of said Court:

The petition of Charles Mason Lane, otherwise called Charles Lane, respectfully states and shows, that he is

confined unlawfully and against his will in the penitentiary of the State of Kansas, and is in the custody of the warden of the said penitentiary, under the following state of facts:

On the 6th day of September, 1889, there was returned and filed in the United States Circuit Court for the District of Kansas, sitting at Wichita, by the grand jurors of the United States, charged to inquire of offenses committed within that part of the said district north of the Canadian River and east of Texas and the 100th meridian not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, an indictment purporting to be based on section 5345 of the Revised Statutes of the United States, which is as follows:

"Every person who, within any of the places, or upon any of the waters specified in section 5339, commits the crime of rape shall suffer death."

The said indictment charged that your petitioner, on or about the 4th day of July, 1889, at that part of the district of Kansas acquired by the United States of America by the Act of Congress approved March 2, 1889, commonly known as Oklahoma, the same being a place and district of country under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of the said court, with force and arms, in and upon one Frances M. Skeed, a female under the age of 16 years, then and there being, violently and feloniously did make an assault, and her, the said Frances M. Skeed, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

Petitioner entered a plea of not guilty to the indictment, and on the 13th day of September, 1889, the issue

came on for trial in the said court before a jury empanneled for the purpose of trying him. The indictment aforesaid was read to the jury, and the prosecution, for the purpose of supporting the same by proof, against the objection of the petitioner, introduced evidence tending to show that the said Frances M. Skeed was under the age of 16 years. To the ruling of the court admitting the said testimony petitioner duly excepted.

The trial was then proceeded with, and after the testimony on both sides had been heard by the jury, and the counsel had argued the case, the court proceeded to instruct the jury with respect to the verdict it should return.

In the course of its charge the court read to the jury, entire, chapter 120 of the 25th Vol. of U. S. Statutes at Large, the same being the Act of Congress approved on the 9th day of February, 1889, and also, section 1035 of the Revised Statutes of the United States, and thereupon instructed the jury that under the provisions of said section 1035 of the Revised Statutes of the United States, if it found from the evidence that the said Frances M. Skeed was under the age of 16 years at the commission the act alleged in the indictment, then the jury could return a verdict under the said indictment of unlawful and carnal knowledge of a woman under the age of 16 years. To this instruction and direction of the court, petitioner in due form excepted.

The jury thereupon returned its verdict in the following form:

"We, the jury in the above-entitled cause, duly empanneled and sworn, under our oaths find the defendant guilty of carnal and unlawful knowledge of Frances M. Skeed, a female under the age of 16 years, as charged in the indictment."

Petitioner thereupon excepted to the said verdict.

Petitioner thereupon moved for a new trial of the said

issue so found against him, but the court overruled his motion, and he duly excepted to such ruling. Petitioner thereupon filed his motion in arrest of judgment. But the court overruled and refused the said motion, and petitioner excepted to such ruling. Thereupon the court proceeded to pass sentence upon petitioner in the following words, to wit:

SENTENCE.

"Thereupon it is now by the court considered, ordered and adjudged that the said defendant be imprisoned in the Kansas penitentiary for the period of five years.

"It is further ordered that the marshal deliver or cause to be delivered the body of the said Charles Lane to the warden of the said penitentiary within ten days from this date."

Petitioner duly excepted to the said ruling.

Petitioner further states and shows that he duly reserved his exceptions aforesaid by a bill of exceptions duly filed in the said court on the 13th day of September, 1889. Thereupon, subsequently, the said District Court ordered and adjudged that the said cause be certified to the Circuit Court of the United States for the district of Kansas, and the same was accordingly done.

Petitioner now submits along with and as a part of this, his petition, a duly certified copy of the record showing the facts aforesaid, and prays that the court may consider the same, as Exhibit A hereto.

(1.)

(*a.*) In view of the facts aforesaid, petitioner shows and submits to the court that he had never been indicted for the crime of unlawfully and carnally knowing a female under the age of 16 years prescribed in chapter 120, vol. 25, U. S. Statutes at Large, being the Act of Congress approved February 9, 1889, of which he has been convicted as shown above. And, therefore, his conviction

and sentence aforesaid are in violation of that provision of the fifth amendment to the Constitution of the United States which declares that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

(*b.*) And the indictment does not show it instituted and prosecuted by the district attorney of the United States.

(2.)

Petitioner further shows and submits, that section 5345 of the Revised Statutes United States merely adopted the common-law definition of the crime of rape, and when it was enacted on the 3d day of March, 1825, 4 Statutes at Large, U. S., chapter 65, section 4, page 115, it embraced no other crime. And that on the 1st day of June, 1872, when section 1035 of the Revised Statutes of United States was adopted, 17 Statutes at Large, chapter 255, section 9, page 198, the crime of unlawfully and carnally knowing a woman under the age of 16 years was not necessarily included in the crime of rape, as defined by section 5345 of the Revised Statutes. And that the enactment on the 9th day of February, 1889, by Congress, of chapter 120, 25 U. S. Statutes at Large, which, for the first time, created the offense of unlawfully and carnally knowing a woman under the age of 16 years, did not in way affect or extend the meaning of section 5345 of the Revised Statutes.

And so petitioner could not lawfully have been convicted and sentenced in the manner before stated, under an indictment charging only the crime of rape, of the offense of unlawfully and carnally knowing a woman under the age of 16 years.

(3.)

If petitioner is mistaken in supposing that the legislation aforesaid should not be construed to authorize his

conviction in the manner before stated, and if such legislation on its face, properly construed, does authorize such conviction, then petitioner submits that the indictment under which he has been tried, as before stated, did not inform him of the nature and cause of the accusation against him with the particularity and certainty required by law, in this, that the substance of the charge against him, as contained in the indictment, was that he had forcibly and against the will of Frances M. Skeed ravished and carnally known her, whereas the offense, under the Act of Congress of February 9, 1889, U. S. Statutes at Large, volume 25, page 120, and the offense of which the jury found petitioner guilty, was and is perfect and complete by the mere fact that petitioner carnally and unlawfully knew the said Frances M. Skeed, she being a female under the age of 16 years, without reference to the fact whether force was or was not used in accomplishing such crime, or she consented or did not consent thereto.

Wherefore, petitioner submits that his conviction and sentence aforesaid are in violation of that provision of the sixth amendment to the Constitution of the United States which declares that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him.

(4.)

Petitioner further states and shows, as is shown by the record exhibited with this petition, that on the evening of the 14th September, 1889, and after he had been convicted as aforesaid, the grand jurors of the United States aforesaid returned into the District Court of the United States for the District of Kansas, sitting at Wichita, an indictment against him for the specific crime of carnally and unlawfully knowing the said Frances M. Skeed, under the said Act of Congress of February 9, 1889 (ch. 120,

25 U. S. Statutes at Large), and such indictment is yet pending and undisposed of.

Petitioner submits that his conviction and sentence aforesaid are not necessarily a complete and effectual bar and defense to such indictment, and that he is in jeopardy of being again convicted and punished for the crime of which he has already been convicted, and is now being punished as aforesaid; and, therefore, that his conviction and sentence aforesaid are in violation of that provision of the fifth amendment to the Constitution of the United States which declares that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

(5.)

Petitioner further states and shows, that by the very terms of the Act of Congress of February 9, 1889 (25 U. S. Statutes at Large, ch. 120, p. 658), such act is confined in its operation to the District of Columbia and other places over which the United States has exclusive jurisdiction, excepting the Territories; and that within the several Territories of the United States the said act has no effect.

Petitioner shows and submits that by law, Oklahoma, and the district of country wherein the crime of which petitioner has been convicted was committed, was, when the said crime was committed, and is now, a portion of a Territory of the United States. And so the said Act of Congress, by its own terms, was not and is not the law there, and petitioner could not have been guilty of, nor lawfully convicted of, the crime of which he was convicted, and for which he was sentenced in the manner aforesaid.

Petitioner therefore shows and submits to the court that he is in the custody of the warden of the penitentiary of the State of Kansas, and is confined in the peni-

tentiary of the State of Kansas in violation of the Constitution and the laws of the United States within the meaning of section 753 of the Revised Statutes.

In consideration of the premises, petitioner prays that this court will award him a writ of *habeas corpus* requiring the said warden of the said penitentiary, whose name is George H. Case, to produce the body of petitioner before your Honorable Court at such time as the court may designate, together with the cause of his imprisonment and confinement, to the end that the court may cause to be done what ought to be done in the premises, and that petitioner may be discharged and released from the said unlawful imprisonment.

Petitioner also prays that the court award a writ of *certiorari* directed to the District Court of the United States sitting at Wichita, or to the clerk of the said court, or to the Circuit Court of the United States for the District of Kansas, or the clerk of that court as may be proper, requiring that a copy of the record of the indictment and proceedings aforesaid may be certified and sent into this court for the purposes of this proceeding.

And petitioner prays for all other and further proper relief.

CHAS. MASON LANE.

WM. W. RANDOLPH,
A. H. GARLAND,
H. J. MAY,
Counsel.

UNITED STATES OF AMERICA, }
District of Kansas. }

I, Chas. Mason Lane, petitioner in the foregoing petition, do state on oath, that the matters of fact therein set forth are true to the best of my knowledge, information, and belief.

CHAS. MASON LANE.

Subscribed and sworn to before me, a commissioner of the United States in and for the said District, at Leavenworth Co., therein, on this the 23d day of January, 1890, as witness my hand and seal of office.

[SEAL.] E. N. O. CLOUGH,
Com'r of the Cir. Ct. of the U. S. Dist. of Kans.

EXHIBIT A.

United States District Court, District of Kansas.
September Term, Wichita, 1889.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHARLES (C. MASON) LANE, Defendant, } No.

Indictment for Rape, Rev. Stat., Sec. 5345.

Conviction for unlawful, carnal knowledge of a woman under the age of 16 years, under chapter 120, 25 Statutes at Large, Act of Congress, February 9, 1889.

This case coming on for trial at this term of the court, the defendant, Charles Lane, was arraigned on the following indictment, to wit:

THE UNITED STATES OF AMERICA, }
District of Kansas, } *ss.*

In the District Court of the said United States, in and for the said district, September Term, 1889.

THE UNITED STATES OF AMERICA
vs.
CHARLES LANE, whose more full Christian name is unknown. } Indictment for Rape.

At the term of the District Court of the United States of America, in and for the said District of Kansas, begun and held at Wichita, in said district, on the 2d day of

September, in the year of our Lord one thousand eight hundred and eighty-nine, the grand jurors of the United States of America, duly impanneled and sworn, and charged to enquire of offenses committed within that part of the said district lying north of the Canadian River and east of Texas, and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian Tribes, upon their oaths do find and present that Charles Lane, whose more full Christian name is to the grand jurors aforesaid unknown, late of that part of the public domain acquired by the United States of America by the Act of Congress approved March 2, 1889, commonly known as Oklahoma, and being a part of the District of Kansas aforesaid, on or about the 4th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the District of Kansas aforesaid—the same being a place and district of country under the exclusive jurisdiction of the United States, and within the exclusive jurisdiction of this court—(with force and arms, in and upon one Frances M. Skeed, a female under the age of 16 years, then and there being, violently and feloniously did make an assault, and her, the said Frances M. Skeed, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided.)

E. HAGAN, *Ass't U. S. Att'y.*

[Endorsed]: No. —; The United States *v.* Charles Lane; rape, sec. 5345; J. Hoopes, foreman; a true bill, J. Hoopes, foreman; witnesses, Wm. H. Skeed (Oklahoma City, I. T.,) Frances M. Skeed, Dr. I. W. Benipe, N. T. Ross, Rosa Skeed, Dr. H. C. Hunter (Dodd City, Texas); filed September 6, 1889; J. C. Wilson, clerk.

To which said indictment the defendant entered the plea of not guilty, and the trial thereof was by the court fixed for the 13th day of September, 1889, at 9 o'clock A. M., and defendant remanded to the custody of the marshal.

On this, to wit: The 13th day of September, 1889, being the day fixed by the court for the trial of this case,

defendant being present in open court in the custody of the marshal, and represented herein by O. H. Violet, and J. I. Grider and Wilson and McMeecken of counsel, the defence signified its readiness for trial. The Government, represented by the Hon. W. C. Perry, United States District Attorney, announced itself ready for trial, and the jury was called, impanneled and sworn, and the trial proceeded with. The indictment under which defendant had been previously arraigned, was by counsel for the prosecution read to the jury, and the prosecution proceeded to introduce testimony in support thereof. During the proceedings the prosecution offered to show by a witness, *i. e.*, Wm. M. Skeed, that the prosecutrix, Frances M. Skeed, was under the age of 16 years. To this testimony the defendant objected, on the ground that such testimony was incompetent, irrelevant and immaterial, and non-essential to the support of the charge of rape.

Objection overruled by the court, and testimony allowed to go to the jury. To this ruling the defendant excepted, excepts, and assigns as reason No. 1, in his motion for a new trial, alleging therein its illegality. The trial then proceeded, and the prosecution having announced that it rested, the defendant was permitted to introduce testimony in its behalf, and after announcing to the court that his testimony was all in, the prosecution offered as witnesses Clara E. Walters and C. F. Sommers. To the introduction of which said witnesses defendant objected, on the ground that the names of neither of said witnesses had been endorsed to appear against him on the indictment, and that he had no notice that such persons would testify. This objection being by the court overruled, the said Clara E. Walters, said C. F. Sommers, were each sworn as witnesses and permitted to testify in the cause, and did testify, to which ruling and to which testimony the defendant excepted, and now excepts, and assigns as error No. 2, and urged the same in support of his motion for a new trial as illegal, the same being embraced in reason No. 1 in said motion assigned.

The cause being closed, and the jury having heard argument of counsel for the prosecution and for the defendant, the court proceeded to instruct the jury regarding their form of verdict.

During its charge the court read to the jury, entire, chapter 120, Vol. 25, U. S. Statutes at Large, being Act of Congress approved February 9, 1889. Also section 1035 Revised Statutes, and instructed the jury that under the provisions of said section 1035 Revised Statutes, and considering the said Act of Congress of February 9, 1889, if it found from the evidence that the prosecutrix, Frances M. Skeed, was under the age of 16 years at the date alleged, the indictment, it could return a verdict of unlawful carnal knowledge of a woman under the age of 16 years. To which said instruction of the court the defendant excepted, and now excepts, and assigns as error No. 3, and urged the same in his motion for a new trial as reason No. 3 therein assigned.

Wherefore, the jury having retired under the instruction of the court, returned into court on the day following the trial and presented the following verdict, to wit:

COPY OF VERDICT.

In the District Court of the United States for the District of Kansas.

UNITED STATES)
vs.
CHARLES LANE.)

We, the jury in the above-entitled cause, duly impanneled and sworn, upon our oaths find the defendant guilty of carnal and unlawful knowledge of Frances M. Skeed, a female under the age of 16 years, as charged in the indictment.

W. ACKERMAN, *Foreman.*

Endorsed: The United States *v.* Charles Lane; verdict filed September 14, 1889.

J. C. WILSON, *Clerk.*

To which said verdict the defendant excepted, and now excepts, and assigns as error No. 4, and urged the same in his motion for a new trial as reason No. 3 therein assigned.

On the evening of the 14th day of September, and after the return into court of said verdict, the grand jury returned into court the following, which was placed on the files of the court, and a copy thereof served on the defendant:

UNITED STATES OF AMERICA, *District of Kansas*, } ss:

In the District Court of the said United States, in and for the said District.—September Term, 1889.

THE UNITED STATES OF AMERICA *vs.* CHARLES LANE, whose more full Christian name is unknown. } Indictment for unlawfully and carnally knowing a female under the age of 16 years.

At the term of the District Court of the United States of America, in and for the said District of Kansas, begun and held at Wichita, in said district, on the 2d day of September (1889), in the year of our Lord one thousand eight hundred and eighty-nine, the grand jurors of the United States of America, duly impanneled, sworn, and charged to enquire of offenses committed within that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian Tribes, upon their oaths do find and present, that Charles Lane, whose more full Christian name is to the grand jurors aforesaid unknown, late of that part of the public domain acquired by the United States by the Act of Congress approved March 2, 1889, commonly known as Oklahoma, and being a part of the District of Kansas, aforesaid, on or about the 4th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the District of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, the said Charles Lane, then and there being, in and upon one Frances M. Skeed, then and there being, a female child under the age of 16 years, did then and there carnally, unlawfully, and feloniously make an assault,

and her, the said Frances M. Skeed, then and there feloniously did unlawfully and carnally know and abuse, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

H. HAGAN,
Asst. U. S. Attorney.

Endorsed: No. —. The United States *v.* Charles Lane, Chapter 120, v. 25. A true bill. J. Hoopes, foreman. Witnesses, Frances M. Skeed, Wm. H. Skeed, Dr. J. W. Benipe, N. T. Ross, Rosa Skeed, Clara E. Walters, C. F. Sommers.

J. C. WILSON, *Clerk.*

Filed September 14, 1889.

Leave of the court had, the defendant thereupon filed the following motion to set aside the verdict of the jury and grant him a new trial for the reasons and upon the grounds therein set forth, to wit:

UNITED STATES }
vs. }
C. M. LANE. }

U. S. District Court, District of Kansas.—September Term, 1889.

Now comes the defendant, and, leave of the court had, moves the court to set aside the verdict herein rendered and grant him a new trial, for the following reasons, to wit:

1st. That the court has admitted illegal testimony.

2d. That the court has misdirected the jury in a material matter of law.

3d. That the verdict is contrary to the law and the evidence.

O. H. Violet, Gutherie & Grider, and Wilson & McMeecken, for defendant.

Endorsed No. —. U. S. *vs.* C. M. Lane. Motion for new trial.

Filed Sept. 16, 1889. J. C. Wilson, Clerk.

The court having heard argument of counsel on said motion, overruled the same, to which said ruling of the

court defendant excepted, and now excepts, and assigns as error No. 5, from the effect of which he prays relief.

Defendant thereupon, with leave of the court, filed the following motion in arrest of judgment, viz.:

In the United States Court in and for the District of Kansas.—September Term, 1889.

UNITED STATES OF AMERICA, Plaintiff,
vs.
C. MASON LANE, Defendant.

Indictment for rape. Verdict of unlawful intercourse.

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant by his counsel undersigned, and, with leave of the court, moves for a suspension of judgment and sentence upon him under the verdict of the jury returned, for the following reasons, to wit:

1st. Because the same is contrary to law, and is not sustained by the evidence adduced, for the reason that the offense charged in the indictment under which he has been tried is alleged and proved to have been committed in the town of Oklahoma City, Indian Territory, which locality is one of those specially excepted from the operation of the statute approved February 9, 1889, upon which it is evident in this case was founded.

2d. Because the indictment which this defendant was tried is found under section 5345 Revised Statutes, and charges but one offense—the words, "under the age of 16 years," being surplusage, in so far as they apply to the charge of rape, and insufficient either in that connection or in and of themselves to form and constitute a separate and independent count in the indictment.

3d. That the rule permitting the jury to find a lesser offense under indictment for a greater, was adopted long before the enactment of the statute approved February 9, 1889, and cannot apply to it; that statute creating a new offense not known to the law at the adoption of the other, it could neither expressly or by intendment include the act not then a crime.

4th. That he has been convicted of an offense with which he is not charged in the indictment, one of which he had no notice whatever that he was on trial for, and therefore did not and could not prepare for himself the

defence to which he is by law entitled to make, and could make if permitted, to meet the accusation in the form of indictment.

Respectfully submitted,

O. H. VIOLET.

Guthrie & Grider, and Wilson & McMeecken, of counsel for defendant.

Endorsed: United States *vs.* C. Mason Lane. Motion in arrest of judgment. Filed September 16, 1889. J. C. Wilson, Clerk.

Which said motion was by the court, after argument of counsel, overruled and refused, to which ruling and refusal the defendant excepted, and now excepts, and assigns as error No. 6, from the effect of which he prays relief.

After which the court proceeded to pass sentence upon defendant, which sentence is in the following words, to wit:

"SENTENCE."

"Thereupon it is now by the court here considered, ordered, and adjudged that said defendant be imprisoned in the Kansas penitentiary for the period of five years.

"It is further ordered that the marshal deliver, or cause to be delivered, the body of the said Charles Lane to the warden of said penitentiary within ten days from this date."

To which sentence the defendant excepted, and now excepts, and assigns as error No. 7, from the effect of which he prays the relief of the court.

United States District Court, District of Kansas.
September Term, Wichita, 1889.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CHAS. LANE, Defendant.

Bill of Exceptions.

Be it known that, on the trial of the above-entitled and numbered cause, to wit, on the 13th day of September,

A. D. 1889, the following exceptions were reserved by defendant to the rulings of the trial judge, and are hereby certified as correct.

1ST.

The prosecution offered the testimony of Wm. M. Skeed to show that the prosecutrix, Frances M. Skeed, was under the age of 16 years, which testimony was objected to by defendant as incompetent, irrelevant, and immaterial. Defendant's objection was overruled, and the testimony received.

UNITED STATES OF AMERICA, } ss.
District of Kansas, }

I, J. C. Wilson, clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true and correct copies of the indictments, motion in arrest of judgment, verdict, and sentence in the case of the United States *v.* Charles Lane.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at my office, in Topeka, in said District of Kansas, this 6th day of December, A. D. 1889.

[SEAL.] J. C. WILSON, *Clerk.*

UNITED STATES OF AMERICA, } ss.
District of Kansas, }

At a term of the District Court of the United States of America for the District of Kansas, begun and held at the city of Wichita, in said district, on Monday, the 2d day of September, 1889, proceedings were had and appear of record, in words and figures following, to wit:

FRIDAY, *December* 6, 1889.

UNITED STATES }
(544) *vs.* } Indictment for rape.
CHARLES LANE. }

Now comes the defendant in the above-entitled case by his attorney, O. H. Violet, Esq., and moves the court that the above action be certified to the United States Circuit Court for this District.

Thereupon, it is now by the court here considered, ordered, and adjudged that this case be certified to the said Circuit Court.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Topeka, in said District, this 6th day of December, A. D. 1889.

[SEAL.] J. C. WILSON, *Clerk.*

U. S. Dist. Court, Dist. of Kansas, Wichita Term, Sept., 1889; United States, pl'ff, *v.* Charles Lane, def't; No. 6421; transcript; filed Dec. 6, 1889; Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss.*

I, Geo. F. Sharitt, clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of transcript, from the United States District Court, District of Kansas, in the case of United States *v.* Charles Lane, No. 6421, in said court.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at my office, in Topeka, in said District of Kansas, this 14th day of January, A. D. 1890.

[SEAL.] GEO. F. SHARITT, *Clerk.*